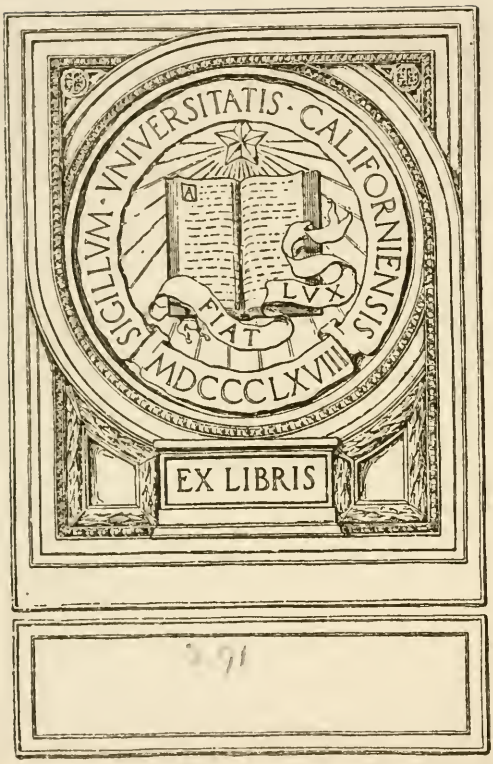
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THE RELATION OF INTERNATIONAL LAW TO THE LAW OF ENGLAND AND OF THE UNITED STATES OF AMERICA

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THE RELATION OF INTERNATIONAL LAW TO THE LAW OF ENGLAND AND OF THE UNITED STATES OF AMERICA

A STUDY

BY

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WITH AN INTRODUCTION

BY

L. OPPENHEIM, LL.D.,

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PREFACE

This book is an attempt to answer a question of some difficulty, partly of International and partly of Constitutional Law, which the Author thinks has not yet been adequately dealt with. The learned papers of Dr. Holland (in his "Studies in International Law"), of the late Dr. Westlake (in the Law Quarterly Review), and of Mr. J. B. Scott and Mr. W. W. Willoughby (in the American Journal of International Law) are, it is believed, the most valuable English and American contributions to the subject.

It is hoped that the book may have a less purely academic interest for the practising lawyers of England and the United States than is possessed by most works on topics of International Law. The matter with which it deals has frequently come before the Courts of both countries, and in England, at least, assumed great and practical importance as recently as 1905 in a case which arose out of the Boer War. The relevant decisions of the present Prize Court have been incorporated.

I wish to take this opportunity of thanking Professor Oppenheim for the unfailing help and encouragement he has so freely given me, and more especially for permission to embody the results of a paper on Orders in Council read by him before the Cambridge Law Society; also my friend Mr. P. Quass, of the Inner Temple, for the assistance he has given me in the preparation of the index. C. M. P.

2, Dr. Johnson's Buildings, Temple.
Hilary, 1915.

INTRODUCTION

THE relations between International Law and Municipal Law, in spite of the great importance of the matter, have formerly never *ex professo* been enquired into. It may be said that it is only during the last twenty-five years that a few writers have given attention to this subject, and there is no unanimity amongst them with regard to it. There are some publicists who assert that International Law is above Municipal Law, and that, therefore, the rules of the former are stronger than the rules of the latter. Accordingly, a Municipal Court would have to apply all customary and conventional rules of International Law whether or no they are expressly or implicitly adopted by the Municipal Law of the State concerned, and even in the case where there is a decided conflict between a rule of Municipal Law of such State and a rule of International Law. The maxim of this school of thought is: "International Law in every case overrules Municipal Law." It is asserted, mostly by Continental writers, that this maxim has been recognised by the law of England, as well as by the law of the United States of America.

However, this opinion would seem to be more a pious *desideratum* than the result of scientific investigation and practical consideration. International Law and the Municipal Law of the several States are so essentially different that it would be strange if any Municipal Law had adopted the maxim "International Law in every case overrules Municipal Law." International Law is a body of rules which exclusively concerns the legal relations between the several civilised States; whereas the Municipal Law of every State is a body of rules which con-

cerns the legal relations of the citizens with one another and also the legal relations between the citizens and that State. The sources of International Law are international customs and international conventions; whereas the sources of the Municipal Law of a State are customs which have grown up within the boundaries of that State, and statutes. For this reason, neither can International Law *per se* create or invalidate Municipal Law, nor can Municipal Law *per se* create or invalidate International Law. International Law and Municipal Law are in fact two totally and essentially different bodies of law which have nothing in common except that they are both branches—but separate branches—of the tree of law. Of course, it is possible for the Municipal Law of an individual State by custom or by statute to adopt rules of International Law as part of the law of the land, and then the respective rules of International Law become *ipso facto* rules of Municipal Law. For instance, the rules of International Law concerning Prizes have in this way been adopted by English law, with the consequence that every new Prize Law rule of International Law *ipso facto* becomes a rule of English law. Wherever and whenever such adoption has not taken place Municipal Courts cannot be considered to be bound by rules of International Law, because the latter have *per se* no power over the Municipal Courts. And if it happens that a rule of Municipal Law is in indubitable conflict with a rule of International Law, the Municipal Courts must apply the former. If, on the other hand, a rule of International Law regulates a fact without conflicting with, but at the same time without expressly or tacitly having been adopted by, Municipal Law, Municipal Courts cannot apply such rule of International Law.

Now whether or no the Municipal Law of a certain State has, by custom or statute, adopted the rules of International Law *in toto* or *in parte* is a question of fact which can only be answered by a minute enquiry into the practice of the Courts

and the legislation of each State. To my knowledge, no really thorough and all-embracing enquiry had as yet anywhere been made, although in England, in the United States of America, and in Germany a few learned and valuable contributions concerning the subject existed. For this reason, some time ago, when Mr. Picciotto consulted me with regard to a subject for his Whewell Scholarship Dissertation, I recommended him to choose "The Relation of International Law to the Law of England." That the categorical assertion "International Law is part of the law of England and the United States of America" is not correct is evident, because there are well-known cases in which English and American Courts had to refuse the application of rules of International Law. On the other hand, there was no doubt that English as well as American law had adopted the rules of International Law to a great extent; but exactly to what extent had not been ascertained, at any rate not with regard to English law. Mr. Picciotto has now filled the gap by the present study. Without identifying myself in every detail with the opinions of Mr. Picciotto, I believe that the results of his enquiry represent on the whole the true relation between International Law and the Law of England. By enquiring separately into the relations of International Law to the Prize Law, the Statutory Law, and the Common Law, he has pursued the right method. And by drawing attention to the important change which the conception of International Law has undergone since the second half of the nineteenth century he has supplied an explanation of the difference in the views which are manifest in the judgments of the Courts before and after the second half of the nineteenth century. It is evident that the views of Courts which considered International Law to be the dictates of a law of Nature and of right reason must largely diverge from the views of such Courts as considered International Law to be a body of rules created by international custom and international conventions. However this may be,

so much would seem to be certain, that Mr. Picciotto's study has finally dispelled the illusion that International Law to its whole extent is part of the law of England.

As regards the United States of America, it is to be taken into consideration that the President cannot, without previous consent of the Senate, ratify any international treaty. The indispensable consent of the Senate to every treaty explains the fact that, according to Article VI of the American Constitution, all international treaties of the United States are the supreme law of the land. However, in case an Act of Congress contains rules not in agreement with stipulations of a previous international treaty, the American Courts consider themselves bound by the Act of Congress, and not by the stipulations of the previous treaty. It is obvious that, according to the practice of the Courts of the United States, International Law and Municipal Law are of *equal* force, with the consequence that new rules of International Law supersede rules of previous American Municipal Law, and new rules of American Municipal Law supersede rules of previous International Law. For this reason the assertion of American writers that International Law *in toto* is part of the law of the United States is misleading. It would be more correct to say that International Law is part of the law of the United States *in so far as it is not in conflict with the American Constitution, and subsequent American Municipal Law does not enact rules in opposition to previous International Law.* This condition of affairs is by no means satisfactory, since at any time any rule of International Law which has hitherto been a rule of American law can be made ineffective by an Act of Congress.

L. Oppenheim.

The Relation of International Law to the Law of England and of the United States of America

CHAPTER I.

General Notions.

The Nature of the Problem.

1. An antithesis with which international lawyers are often called upon to deal is that between International Law and Municipal Law. It is obvious that it is of the highest importance to determine adequately the true relation subsisting between these two; for whether we view International Law from the standpoint of Municipal Law (as when the law of the State has insufficiently provided for its international obligations), or Municipal Law from the standpoint of International Law (as when International Law has given a State a right about which her Municipal Law is silent), it is clear that no useful result can be reached unless there is an unshakeable basis of true doctrine upon which argument may proceed.

In some States of the society of nations the question presents less difficulty than in others. For example, the Constitution of the United States settles, at any rate, the position of treaties. In this country there is no such precision. The organic and continuous unity of our legal development has been unfavourable to a system of codification, while it has given every encouragement to judicial precedent as an important source of law proceeding upon ascertainable and scientific rules. The result of this has been that in order to elicit the true facts of the relation in which Great Britain deems her law to stand to the Law of Nations, we must attempt to collect, and, if need be, to reconcile, judicial pronouncements contained in cases in which questions of International Law have arisen, from the earliest date at which such cases appear in the books.

The problem, then, which will now be considered is —What is the relation of International Law to English Law, what is its place in our Courts, and what rules of evidence govern its proof in those Courts?

The Basis of International Law.

2. International lawyers fall roughly into three main schools of opinion—the Naturalists, the Positivists, and the Grotians. The doctrine of the Naturalists is (1) that International Law is a body of moral rules for the guidance of States with one another; (2) that its method is *a priori*; and (3) that it is proveable by the writings of the jurists, who arrive at their results rather by an application of moral first principles than by any serious

deductions from fact and the practice of States. Intermediate between the other two come the Grotians. The distinction is well put by the late Mr. Hall[1]:—

"Two principal views may be held as to the nature and origin of these rules. They may be considered as an imperfect attempt to give effect to an absolute right which is assumed to exist and to be capable of being discovered, or they may be looked upon simply as a reflection of the moral development and the external life of the particular nations which are governed by them."

The second of these views represents the Positivist school. Of this school Professor Oppenheim[2] says:—

"The Positivists are the antipodes of the Naturalists. They include all those writers who, in contradistinction to Hobbes and Pufendorf, not only defend the existence of a positive law of nations as the outcome of custom or international treaties, but consider it more important than the Natural Law of Nations, the very existence of which some of the Positivists deny, thus going beyond Zouche. The Positive writers had not much influence in the seventeenth century, during which the Naturalists and the Grotians carried the day, but their time came in the eighteenth century."

It is not too much to say that the modern view (dating,

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[1] International Law, 6th Edition, p. 1.

[2] International Law, 1912, p. 90.

roughly, from the middle of the last century) is now predominantly supreme, and that the basis of International Law is now entirely Positivist; it rests upon fact and practice, and no longer upon speculation. Thus Professor Oppenheim[1] says:—

"The sources of International Law are therefore twofold, namely (1) express consent, which is given when States conclude a treaty stipulating certain rules for the future international conduct of the parties; (2) tacit consent, which is given through States having adopted the custom of submitting to certain rules of International conduct. Treaties and customs, therefore, are exclusively the sources[2] of the Law of Nations."

This scrutiny of fundamentals would be incomplete without a mention of the distinction to be drawn between (a) Universal International Law, to which all nations have given their assent; (b) General International Law, to which a great or important part have given their assent; (c) Particular International Law, which is binding only upon that small group of States who have given their assent.

Some stress has been laid upon the distinction between the Naturalist and the Positivist School because much of what seems difficult of explanation in some of the eighteenth century judgments becomes intelligible

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[1] International Law, Vol. I, p. 22 (1912).

[2] By this the writer doubtless means "formal" sources. *v.* Salmond's Jurisprudence, sub loc. "Sources of Law."

if we understand that the judges of those days had in their minds something very different from what we understand by International Law, and proceeded upon basic principles which we, of to-day, have mainly or entirely rejected.

Some help is afforded us in the attempt to answer the question, In what relation stands International Law to the Municipal Law of England, by the literature on the subject. But those jurists who have given any attention to it have either contented themselves with general statements without a more minute investigation, or have confined themselves to one branch, such as the relation between Acts of Parliament and International Law, so exhaustively treated by Professor Holland in his "Studies."[1] In order to answer the question fully, and, so far as the hesitating tone of the authorities will allow, finally as well, it is necessary to combine these two methods. Therefore the relation must be considered between International and English Municipal Law (1) in respect of Acts of Parliament and Orders in Council; (2) in respect of treaties; (3) in respect of the Common Law.

International Law a Law between States.

3. At this point it may be well to clear our minds for the enquiry by noting the elementary proposition (yet one which we cannot too often recall) that International Law is a law made between and binding upon States as per-

[1] Studies in International Law, p. 176.

sons *inter se*, while Municipal Law is a law made by States for those persons who are properly liable to its commands or restrictions. Sometimes these commands or restrictions relate to international duties, and this forms the point of contact between the two kinds of law. This distinction is clearly brought out by Professor Oppenheim in his treatise.[1] Speaking of the neutral duties of States, he says:—

"As International Law is a law between States only and exclusively, neutrality is an attitude of impartiality on the part of States and not on the part of individuals. Individuals derive neither rights nor duties, according to International Law, from the neutrality of those States whose subjects they are. Neutral States are, indeed obliged by International Law to prevent their subjects from committing certain acts, but the duty of these subjects to comply with such injunctions of their sovereign is a duty imposed upon them by Municipal and not by International Law." This suggests to the mind such municipal measures as the Foreign Enlistment Act, or the Extradition Acts, and, indeed, all that group of legislation which ensures the observance of duties to other States.

Municipal Law the means of giving effect to rules of International Law.

4. Now, so far as England goes, this statement is in the main true, and it is entirely true in respect of Acts of Parliament, many of which exist for the enforcement of our obligations internationally contracted. At this

[1] 2 International Law, 1912, p. 363.

point we must reserve discussion of the relation between International Law and the Common Law. It is pointed out elsewhere† that the fact that the law of England is found in judicial pronouncements collectively known as the Common Law (whose origin is shrouded in obscurity), as well as in enacted measures, adds greatly to the difficulty of arriving at a clear and decisive result. But if we bear in mind Professor Oppenheim's observation quoted above, and then apply it to such measures as, e.g., the Foreign Enlistment Act we find that we get a conception of such portions of Municipal Law as deal with matters of international concern as mere machinery constituted to enforce rights and duties. This view naturally regards Municipal Law as in the subordinate position, and accessory to the larger purpose of international obligation. Stephen views the matter from the converse standpoint. This will be clear from the following quotation[1]:—

". . . It is often said that by International Law any nation may seize and condemn as prize any ship with its cargo which attempts to break a blockade, . . . but if the matter is carefully considered it will, I think, appear that the law enforced is not a law common to all nations, but the law of the nation which seizes the ship. Each nation in this matter legislates concurrently for all mankind, and as upon the whole this is regarded as convenient for all mankind, no one nation objects. The

† p. 75.

[1] History of Criminal Law, II, p. 34.

law, however, is not a law made by all nations, but a law which each nation makes for all mankind . . . . *the consent of nations does not impose this law. It is merely a circumstance, which enables it to be imposed by individual nations, and it is not even an absolutely indispensable circumstance.*"

The material words are placed in italics. Stephen's view amounts to this, that International Law is merely a condition precedent to Municipal Law, a circumstance that makes it possible, and not an indispensable circumstance at that. The real effect of this, if pushed to its logical conclusion, is to deny the very existence of International Law as a body of rules of legally or even quasi-legally binding force. Instead of a general International Law, which requires the Municipal Law of each State to come up to its standard of fitness, we find a portion of the Municipal Law of each State dealing with matters of international concern, roughly in harmony with the corresponding portion of the law of the other States, by virtue of agreement arrived at as the result of either a treaty or a course of practice.

Westlake and others on Relation between the two kinds of Law.

5. So much by way of general observation. We now come to examine the opinion of the few leading jurists who have considered the question. The late Dr. Westlake, in an article published in the "Law Quarterly Review" for the year 1906, sums up his position thus[1] (p. 26):—

[1] Law Quarterly Review, 1906, Vol. 22.

"The English Courts must enforce rights, given by International Law as well as those given by the law of the land in its narrower sense, so far as they fall within their jurisdiction in respect of parties or places, subject to the rules that the king cannot divest or modify private rights by treaty (with the possible exception of treaties of peace or treaties equivalent to those of peace), and that the Courts cannot question acts of State (or, in the present state of the authorities, draw consequences from them against the Crown).

"The International Law meant is that which at the time exists between States without prejudice to the right and duty of the Courts to assist in developing its acknowledged principles in the same manner in which they assist in developing the principles of the Common Law."

This article will be more fully examined in another connexion.† For the present it is enough to say that the sentences quoted make it clear that the writer was inclined to make International Law directly binding on the Courts, and to attach to it an importance which English law and practice is hardly inclined to accord it, as will be submitted hereafter.

Professor J. B. Scott, the learned American jurist, writing in 1907, is of the same opinion[1]:—

"Laying aside theory and coming to the realm of

† p. 39.

[1] American Journal of International Law, 1907, Part 2, p. 852.

tangible fact, it will be seen that Courts of Justice acknowledge and administer International Law untroubled by, perhaps unconscious of, the doubts and misgivings of Austin and the analytical school of jurisprudence. For the past two centuries English judges of the highest repute have declared from the bench that International Law is part and parcel of the Municipal or Common Law of the realm."

This proposition will be examined and contested later.

Professor Oppenheim, writing in 1912, disagrees. He says[1]:—

"If the Law of Nations and Municipal Law differ as demonstrated, the Law of Nations can neither as a body nor in parts be *per se* a part of Municipal Law. Just as Municipal Law lacks the power of altering or creating rules of International Law, so the latter lacks absolutely the power of altering or creating rules of Municipal Law."

Mr. Pitt Cobbett's view is as follows[2]:—

"Notwithstanding some statements to that effect made by the text-writers, and some dicta to be found in the decisions, it can scarcely be said that the Law of Nations is 'adopted in its full extent by the Common Law,' or that it is 'deemed to be part of the law of the land.'"

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[1] International Law, Vol. I, p. 26.
[2] Cases, Vol. I, p. 21 (1909).

6. Much criticism has been levelled at Austin's contribution to legal science. But English lawyers owe him a debt of gratitude. He realised with startling clearness the scope and authority of an Act of Parliament. Before his time its force had been limited by such reservations as its conformity with the Law of Nature or Right Reason. He cleared the ground by propounding a definition of positive law which has put our conception on a new and permanent basis. It is due to him that we now recognise what is to-day a truism, but was far from that when he wrote, that an Act of Parliament cannot be illegal, that it is *ex hypothesi* law, and that all that a Court may do is to administer and interpret it according to well-recognised and scientific canons of construction. So that to a modern English lawyer trained in his school it is difficult to realise that there was a time, and that not beyond the memory of some still living, possibly, when this proposition was still fighting for the place of security which it now certainly holds.

The Austinian View of Law

Acts of Parliament in General.

Before we pass to the further consideration of Acts of Parliament, it will be as well to note some of the Acts of international importance mentioned in Professor Holland's Studies.[1] He divides Acts of Parliament relating to international matter into two categories:—

Acts of Parliament in particular

Acts conferring rights, and

Acts providing for the performance of duties.

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[1] Studies in International Law, p. 176.

He regards the Act of Parliament as something final and incapable of modification by reluctant judges. "Legislation of either kind," he says, "must be vigilantly watched, lest it lead into diplomatic difficulties. Excess in assertion of right and defect in recognition of duty may alike prove a *casus belli*." By this he clearly means that it is for the Courts to apply an Act, and for the Government to deal with such international difficulties, if any, as should arise.

(1) The Naturalisation Act of 1870 reaffirms the Common Law doctrine that all persons born within the King's dominions are British subjects, and makes provision also for option by persons who have a double nationality.

The Territorial Waters Jurisdiction Act of 1878 conferred upon the Crown the right denied it at Common Law by the Court of C.C.R. of exercising jurisdiction through the Central Criminal Court for the space of one marine league measured from low-water mark.

The extra-territorial and consular jurisdiction exercised in Turkey and in certain other Eastern States is conferred by a series of Acts of Parliament merged into the consolidating Foreign Jurisdiction Act of 1890.

(2) The outstanding Act in this category is the famous 7 Anne c. 12 which regulates the privileges of diplomatic envoys.

The provision for the due observance by this country of her duties as a neutral is made by the great Foreign

Enlistment Act of 1870. There have been Acts regulating international duties in time of war since the clause of Magna Carta, which provides for the treatment of alien enemies within the jurisdiction at the outbreak of war.

CHAPTER II.

International Law in Courts of Prize and Admiralty.

Holland and Westlake on the Law of Prize Courts.

7. Professor Holland lays down the two propositions that International Law is part of the Common Law of the realm, and also that if this be admitted and it is part of the Common Law, it will be overridden, as is any other portion of the Common Law, by an Act of Parliament. "The contrary view," he says, "has hardly found expression in any of the ordinary Courts of Law or Equity. . ."

But he seems to place Prize Courts in a separate category, and to suggest, and, indeed, to assert, that a Prize Court is not bound by an Act of Parliament which runs counter to International Law in the same way as is an ordinary Court. This view will be examined in the light of the cases.

The late Dr. Westlake's view seems scarcely consistent. He says[1]:—

"Those Courts (i.e., Courts of Prize) sit under national authority, and must obey the determinations of

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[1] 22 Law Quarterly Review, 1906, p. 24.

the constitutional national authority. . . Consequently for the purpose of enquiry how far International Law is part of the Law of England, a British Prize Court stands on the same footing as the High Court of the judges to whom a Petition of Right is referred, and that International Law is its law, in the absence of express interference by constitutional authority, is an elementary fact."

8. The earliest judicial reference to the question is to be found in the *Maria*.[1] The facts of the case are immaterial for the purposes of understanding the judgment, and need not be stated here. Sir William Scott said in the course of his decision:— **The "Maria," 1799.**

"In forming that judgment I trust it has not escaped my recollection for one moment what it is that the duty of my station calls for from me: namely to consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out without distinction to independent States, some happening to be neutral and some to be belligerent. The seat of judicial authority is indeed locally here, in the belligerent country, according to the known law and practice of nations; but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he

[1] 1799, 1 Rob. 340.

would determine the same question if sitting at Stockholm—to assert no pretensions on the part of Great Britain which he would not allow to Sweden under the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character. If, therefore, I mistake the law in this matter, I mistake that which I consider, and think I mean should be considered, as the universal law upon the question."

The first observation that is to be made upon this extract is that, while it is a valuable indication of the view Stowell took of the basis and scope of his jurisdiction, yet in substance it really amounts to little more than this—a statement that all nations are entitled to "equality before the law," that International Law is not a changing and capricious set of rules modified and adapted to the convenience of the captor, but a settled, uniform, and clearly ascertainable body of principles. It is also to be noted that there is no indication at any point in the judgment that in a conflict between International Law and an Act of Parliament the latter would receive secondary attention. It is, on the other hand, reasonably clear that he regarded a Prize Court jurisdiction as something quite distinct from that of an ordinary Municipal Court, and himself as administering something which was not English Law, but a kind of *jus gentium* or Common Law of civilised nations.

9. In the next case of any importance the same learned judge made some further observations on the same point. The *Walsingham Packet*[1] was a case of a British packet retaken from the enemy in which a claim was given for the cargo as the property of British and Portuguese merchants, and resisted on the part of the captors on the ground of the illegality of such a trade under 13 and 14 Car. II, c. 11. In the course of his judgment he said:— **The "Walsingham Packet," 1799**

". . . This Court is properly and directly a court of the law of nations, and I am not aware that any case had occurred before the present war in which the Court had acted on the principle on which it certainly did act in the case alluded to. I mean the case of the *Eliza*. It was the case of a ship and cargo, in which the claimant being a British subject appeared to have been engaged in trafficking with that cargo in direct violation of British Acts of Parliament. It occurred to those who were entrusted with the concerns of the captor that a resistance to such a claim might be sustained upon a ground which had not been occupied in any other case that had occurred, viz., that although this Court is properly and directly a Court of the law of nations only, and not intended to carry into effect the Municipal Law of this or any other country; and although it was in the habit of declining to take notice of the private laws of other countries; yet it was an enquiry worth pursuing whether

[1] 1799, 2 Rob. 77.

a British Court of Admiralty, sitting here armed with its power from this country and carrying all its present process into effect by authority of the British Parliament, was not so far a British Court as to be bound to take notice of British Acts of Parliament, and the flagrant breach of our Municipal Laws, with respect to the transaction of our own subjects coming incidentally before it. . . The principle was affirmed and established that a British Court of Admiralty was bound to take notice of the violation of an Act of Parliament appearing on the face of the claim, and that a British claimant could not entitle himself in such a Court to a restitution of that property which by his own showing appeared to have been employed in an illegal trade."

The first point in this judgment that arrests the attention is that the learned judge seems to have invested International Law with such a sanctity that he actually needs to convince himself with an elaborate process of reasoning and by reference to a previous decision that a British subject cannot come into a British Court of Admiralty in order to sustain a claim that rests upon a breach of British laws. This case may be said to mark the climax of the tendency to exalt International at the expense of Municipal Law. Further, it would seem that the observations made by the learned judge in the earlier part of his judgment are with difficulty to be reconciled with those which he makes at a later stage. He remarks that the Prize Court is concerned merely with the law of nations, and has no concern with the Muni-

cipal Law of any particular State. Later on he seems to base his judgment on the consideration that the Court is a "British Court of Admiralty, sitting here, armed with its power from this country, and carrying out all its process with the authority of the British Parliament." It is no long distance from such a strong statement as this to the bold admission that the Prize Court, like any other of the King's Courts, administers the law of the land.

10. The *Recovery*[1] was the case of an American vessel with a cargo of cotton, taken in at Bombay, from where she had proceeded to Salem in America, whence she sailed again, without unloading, for Rotterdam, on which voyage she was seized. She was brought in for trial on the ground of her violation of the Navigation Laws. In the course of his judgment Lord Stowell said:— **The "Recovery," 1807.**

". . . I am now sitting in a Court of Prize, and the prayer that is addressed to the Court is that it would inflict the penalties of the Revenue Court on a foreign ship and cargo that is brought before it on a seizure of war. . . But there is no instance in which the same principle has been applied to foreigners. In some cases where it has been pressed in argument the Court has invariably resisted the application; and there are many reasons which would make me very unwilling to take on myself the extension of the principle, without

[1] 1807, 6 Rob. 341.

having it imposed upon me by the authority of the Superior Court. . . . It is asked, if you apply such a principle to the claim of British subjects, why not also to those of other nations? Some distinctions are obvious. In the first place, it is to be recollected that this is a Court of the Law of Nations, though sitting here under the authority of the King of Great Britain. It belongs to other nations as well as to our own; and what foreigners have a right to demand from it is the administration of the law of nations simply and exclusively from our own municipal jurisprudence, to which it is well known they have at all times expressed no inconsiderable repugnance."

The learned judge therefore refused to enforce the Acts.

Observations of Sir J. Mackintosh, 1807.

11. Sir R. Phillimore[1] quotes a passage from the Life of Sir J. Mackintosh containing some sentences of a judgment of his when sitting as Recorder of Bombay under a Commission of Prize (about 1807). The Recorder stated it to be the "duty of the judge to disregard the 'instructions' supposing them to be illegal, and to consult only that universal law to which all civilised Princes and States acknowledge themselves to be subject. . . . In the case of such illegal instructions he was convinced that English Courts of Admiralty would as much assert their independence of arbitrary mandates as English Courts of Common Law."

[1] 3 Phill. s. 436.

12. The judgment of Lord Stowell (then Sir W. Scott) in the important case of the *Fox and Others*[1] contains some interesting observations. This was the case of an American vessel taken and seized on a voyage from Boston to Cherbourg. It was contended by the captors that the ship being destined to a French port was liable to confiscation under the Order in Council of 26th April, 1809. **The "Fox," 1811.**

"In the course of the discussion," said the learned judge, "a question has been started: What would be the duty of the Court under Orders in Council that were repugnant to the law of nations? It has been contended on one side that the Court would at all events be bound to enforce the Order in Council; on the other, that the Court would be bound to apply the rule of the law of nations adapted to the particular case, in disregard of the Orders in Council. I have not observed, however, that these Orders in Council, *in their retaliatory character*, have been described in the argument as repugnant to the law of nations, however liable to be so described if merely original and abstract. And therefore it is rather to correct possible misapprehension than from the sense of any obligation that the present discussion imposes upon me that I observe that this Court is bound to administer the Law of Nations to the subjects of other countries in the different relations in which they may be placed towards their country and its govern-

[1] 1811, Edw. Adm. Reports, 312.

ment. This is what other countries have a right to demand for their subjects and to complain if they receive it not. This is its unwritten law evidenced in the course of its decisions, and collected from the common usage of civilised States. At the same time, it is strictly true that by the constitution of this country the King in Council possesses legislative rights over this Court, and has power to issue orders and instructions which it is bound to obey and enforce; and these constitute the written law of this Court. These two propositions, that the Court is bound to administer the Law of Nations and that it is bound to enforce the King's Orders in Council, are not at all inconsistent with each other, because these orders and instructions are presumed to conform themselves, under the given circumstances, to the principles of its unwritten law. They are either directory applications of these principles to the cases indicated in them . . . . or they are positive regulations, consistent with these principles, applying to matters which require more exact and definite rules than those general principles are capable of furnishing."

The learned judge then proceeded to draw an analogy between Orders in Council and the unwritten rules of International Law on the one hand, and Acts of Parliament and the Common Law on the other. He declined to enter into any speculation as to the duty of the Court in the case of a conflict between an Act of the Legislature and the "approved principles of reason and

justice" of which the Common Law consists, on the ground that the Court cannot "without extreme indecency" presume that any such conflict could arise.

This is a very instructive judgment. It is clear that the learned judge found himself in a difficulty. He was on the one hand forced to admit the elementary proposition of English Law that the King in Council has power to issue all orders for the conduct, etc., in time of war, of his armed forces, both military and naval, and that such orders are of binding effect on a Court of Prize. But he was forced by his previous decisions and his whole conception of the basis and function of a Prize Court to uphold the equally binding force of International Law. He was therefore driven to reconcile the two in the possible case of a conflict between them. In the case before us he was able to do so by holding that the Order in Council was retaliatory, and therefore in conformity with International Law. But he went further, and declined to make an allowance for such a conflict in general by erecting the violent presumption that the two must always be in harmony. Thus by a pure legal fiction he was able to maintain his difficult position. The allusion he makes to Acts of Parliament in conflict with the Common Law is suggestive. It is submitted that the learned judge took the view of Acts of the Legislature which was prevalent in his day and applied the same to the procedure of a Prize Court. His view, shortly put, then, amounts to this—that a

Common Law judge sitting in a Court of Common Law will strain every nerve to avoid the admission of a conflict between an Act of Parliament and the "rules of right reason" contained in the Common Law, but in an extreme case might be at liberty to follow the Common Law in preference to the Act; and that similarly a Prize Court judge will strain every nerve to avoid the admission of a conflict between an Act of Parliament or an Order in Council and the unwritten rules of International Law, but in an extreme case would be prepared to follow the rules of International Law, as indeed Stowell in fact did in the case of the *Recovery* quoted above.

The "Girolamo," 1834.

13. The case of the *Girolamo*[1] is even stronger. In that case the Court of Admiralty was sitting in its "instance" jurisdiction and not as a Court of Prize. Yet Sir John Nicholl makes the following observations in his judgment:—

". . . This defence is set up by a foreign owner on behalf of a foreign ship in a Court governed by the principles of International Law, and a question arises whether a foreigner can, in a suit in this Court, set up as defence a municipal law made to regulate municipal courts only, and contrary to those general rules of law which prevail amongst commercial nations. . . ."

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[1] 1834, 3 Hagg. Adm. 169.

14. In the case of *Cope v. Doherty*[1] the material point was whether the Merchant Shipping Act of 1854 extended to foreigners and to foreign vessels on the high seas. Page-Wood, V.-C., remarked in the course of his judgment:— **Cope v. Doherty, 1858.**

". . . The question arises whether the legislature of this country has a right to restrict the privileges which foreign owners would enjoy under the general law of nations and say, 'whenever you are run down by a British ship on the high seas, if you seek your remedy under the general law of nations which would entitle you to full damages in respect of all the injury you have sustained, you are to be tied down by the Municipal Law of this country.' . . . It would be to impute to the legislature of this country an attempt to legislate for foreigners by taking away those rights and privileges which they enjoy by the general law."

The presumption was, he held, against any such attempt.

15. The *Annapolis*[2] turned on the same point. Dr. Lushington said:— **The "Annapolis," 1861.**

". . . The Parliament of Great Britain, it is true, has not according to the principles of public law any authority to legislate for foreign vessels on the high seas, or for foreigners out of the limits of the British jurisdiction, though if Parliament thought fit to do so

[1] *Cope v. Doherty*, 1858, 4 K. & J.
[2] 1861, 30 L. J. P. & M. 201.

this Court, in its instance jurisdiction at least, would be bound to obey. The presumption is strong against Parliament by legislation contravening International Law. In cases admitting of possible doubt the presumption would be that Parliament intended to legislate without violating any rule of International Law, and the construction would be accordingly."

Sir R. Phillimore.

16. Even Sir Robert Phillimore,[2] writing as recently as the 'seventies, emphatically adopts the non-municipal view of Prize Law. "It is clear," he says, "that it has never been the doctrine of the British Prize Courts that because they sit under the authority of the Crown the Crown has authority to prescribe to them rules which violate International Law. . . . If Lord Stowell had not considered the Orders in Council to be consistent with International Law and nevertheless had executed them he would have incurred the same guilt and deserved the same reprehension as the judge of a Municipal Court who executed by his sentence an edict of the legislature which plainly violated the law written by the Creator upon the conscience of His Creature."

With the greatest deference to the eminent writer of the above it yet must be said that the value of the whole passage is severely discounted by the presence of the last sentence. Such a view would find little support, it is submitted, at the present day.

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[2] 3 Phill. 436.

17. Before we pass from the treatment of Acts of Parliament and Orders in Council in Prize Courts it will be well to examine the views of two leading jurists of our day. The late Professor Westlake has something to say on the subject in his article on International Law in relation to English Municipal Law.[1] He seems to incline to an opinion intermediate between that of Stowell and Phillimore and that which regards Prize Law as wholly municipal. While he admits that a British Prize Court sits "under national authority and must obey the determinations of the constitutional national authority," and that Lord Stowell could not properly have looked behind the Orders in Council, yet he holds that in the absence of interference by the constitutional authority the Law of the Court is International Law, and that it is the function of the judges of Prize Courts to develop and expound the principles of this law as they would those of the Common Law. It may be inferred from this that the interference by the constitutional authority is an interference by Act of Parliament or by Order in Council; and that in the absence of these the Court does not follow its previous decisions (if it follows them at all) *qua* propositions of English Law declared and expounded by the judges, but *qua* propositions of International Law embodied in these decisions. **Westlake.**

This view then agrees with the principles laid down

[1] 22 L.Q.R., p. 14.

by Lord Stowell in that it makes the "unwritten rules" of International Law the law of the Prize Court, leaving those rules to be expounded by the judges, while it falls short of Stowell in the important particular that according to it an Act of Parliament or an Order in Council concludes absolutely the mind of the Court.

Professor Oppenheim.

18. A far clearer and more satisfying view is given by Professor Oppenheim.[1] "Although belligerents," he says, "have under certain circumstances according to International Law the right to capture neutral vessels, and although they have the duty to bring these vessels for trial before a Prize Court, such trials are in no way an international matter. Just as Prize Courts—apart from the proposed International Prize Court—are municipal institutions, so trials of captured neutral vessels by these Prize Courts are municipal matters. The neutral home States of the vessels are not represented, and directly, at any rate, not concerned in the trial. Nor is, as is commonly maintained, the law administered by Prize Courts International Law. These Courts apply the law of their country. The best proof of this is the fact that the practice of the Prize Courts of the several countries has hitherto differed on many points. Thus, for instance, the question what is and what is not contraband, and, further, the question when an attempt to break blockade begins and when it ends, have hitherto

[1] 2 Oppenheim, p. 553 (1912).

been differently answered by the practice of different States."

The writer very properly points out that practice has been widely divergent in some branches of Prize Law, more especially in the matters of contraband and blockade. Now, even if we applied the modern test of International Law—namely, uniformity of practice—it should be noted, firstly, there was at the time the judgments of Stowell were delivered no such uniformity, nor anything in the smallest degree approaching it; and, in the second place, International Law did not at that period in the main rest upon the basis of practice, but largely upon the *a priori* speculation of writers. We are therefore driven to say that, although the decisions and practice of the Prize Courts of one State differed, even widely, from those of another, yet those Courts were administering not each the law of its own country, but its own view and interpretation of the general Law of Nations. When put thus the question seems to be little more than academic. Between the statement that the Prize Court of each nation administers its own law and the statement that it administers its own view of International Law, the dividing line seems to be slender indeed; and at that we must leave it.

18A. Lastly, the article on Prize Law (to which Lord Mersey is one of the contributors) in the Laws of England contains the following observation[1] to the same effect:—

[1] 23 Hal. Laws of England, 285 n. (6).

"It was asserted by Lord Stowell that the Prize Court was an international court which administered the law of nations . . . but this view is now rightly regarded as questionable."

The "Chile," 1914.

19. The most recent cases, however, decided in the Prize Court, with Sir S. Evans as judge, give a rather wider scope to International Law, and declare in terms that it is the proper law of such a Court. Thus, in the case of the *Chile*,[1] the binding effect of the Sixth Hague Convention was under discussion. The "Chile," a German ship, entered the port of Cardiff on August 4th, 1914, before the outbreak of war. On the following day she was seized by the Customs officers. An Order in Council provided that German ships in British ports at the outbreak of war should be allowed till August 14th in which to depart, provided that reciprocal treatment was accorded. The British Government received no assurance of such reciprocity.

Sir S. Evans, P., said there were two matters he might have to consider: Whether he was bound by the terms of the Hague Convention referred to, and, if so, what was the meaning of Art. II.

The Attorney-General submitted that his Lordship was bound by the Convention, which was an international contract. It stood in the same position as the

[1] T.L.R., Oct. 23rd, 1914.

Declaration of Paris, which, he submitted, must be treated as modifying the Common Law.†

20. In the *Marie Glaeser*[1] the learned President considered in an *obiter dictum* the effect of the Declaration of Paris. After tracing the manner in which it had been acted upon by different States, he said:— **The "Marie Glaeser," 1914.**

"This Court accordingly ought to and will regard the Declaration of Paris not only in the light of rules binding in the conduct of war, but as a recognised and acknowledged part of the law of nations, *which alone is the law this Court has to administer.* But how can it be used or applied so as to support the claimant's case? This Court can only enunciate what it conceives to be the law of nations. If any matter of International Law in controversy between nations requires to be settled by international convention this Court cannot antecedently declare the controverted doctrine to be a part of International Law."

The learned President then went on to consider a series of judgments on the point under consideration in the Prize Courts of America, France, Japan, and Russia, presumably as evidence of the state of International Law.

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† In effect, the President decreed the detention of the vessel, though he said: "I propose to-day in this case to make an order which will not finally determine the rights of the Crown under Articles I and II of the Hague Convention. . . . The Crown is entitled to ask for less than the law could give."

[1] T.L.R., Oct. 23rd, 1914.

The "Berlin," 1914.

21. In the case of the *Berlin*[1] the question at issue was the exemption from capture of fishing-boats.

The President quoted at length from the judgment of the Supreme Court of the United States in the *Paquete Habana* and the *Lola*,[2] from Japanese Prize Court decisions and instructions to naval officers. He then continued:—"In this country I do not think any decided and reported cases have treated the immunity of such vesesls as a part or rule of the law of nations (see the *Young Jacob and Joanna*, 1 Rob. 20, and the *Liesbet van den Toll*, 5 Rob. 283). But after the lapse of a century I am of opinion that it has become a sufficiently settled doctrine and practice of the law of nations that fishing-vessels plying their industry near or about the coast (not necessarily in territorial waters) in and by which the hardy people who man them gain their livelihood are not properly the subjects of capture in war so long as they confine themselves to the peaceful work which the industry properly involves."

He decreed the condemnation of the "Berlin," however, on the ground that her size, etc., removed her from the exemption.

The "Möwe," 1914.

22. The *Möwe*[3] raised the question of the right of an alien enemy to be heard in the Prize Court, relying upon the Sixth Hague Convention, which gives exemp-

[1] T.L.R., Nov. 13, 1914.
[2] 175 U.S. 677.
[3] T.L.R., Nov 20th, 1914.

tion from condemnation to vessels found within port at the outbreak of war. The President, in delivering judgment, made the following observations:—

"I will now consider whether the owners of an enemy vessel have a right, or should be given the right, to appear to put forward a claim under the Conventions, assuming, as was done during the argument, that they are operative. Dealing with the Hague Convention as a whole, the Court is faced with the problem of deciding whether a uniform rule as to the right of an enemy owner to appear ought to prevail in all cases of claimants who may be entitled to protection or relief, whether partial or otherwise. Mr. Holland argued that this is a matter not of International Law, but of the practice of this Court. That view is correct. I think that this Court has the inherent power of regulating and prescribing its own practice, unless fettered by enactment. Lord Stowell from time to time made rules of practice, and his power to do so was not questioned. Moreover, by Order XLV of the Prize Court Rules, 1914, it is laid down that in all cases not provided for by these rules the practice of the late High Court of Admiralty of England in prize proceedings should be followed or such other practice as the President may direct."

Position of Sixth and Eleventh Hague Conventions in Prize Court.

23. Sir Samuel Evans has already indicated that, had they been ratified by all the belligerents (failing which they are not binding), he would have treated the Sixth and Eleventh Hague Conventions as part of the law of

the Court. He has, in fact, acted on the Sixth, on the ground that, though in strictness not binding, yet it is competent to the Crown to ask for less than that to which it is entitled; on the Eleventh, on the ground that the immunity from capture of small fishing vessels has become part of the customary law of nations.

Orders in Council applying Declaration of London.

24. A more difficult question is presented by the mode of resolving a conflict between an Order in Council and International Law. Lord Stowell in the *Fox* acted upon the strong presumption that such a conflict was impossible. It has been argued above[1] that if the conflict were so glaring and unmistakable as to be beyond any such fictitious reconciliation, then International Law would prevail in the last resort. For example, the Declaration of London has not been ratified, though an Order in Council has adopted most of its provisions, together with the Report of the Drafting Committee, as rules of Prize Law to be applied in the Court. Any Order in Council modifying or limiting its provisions stands on the same footing as any other instruction from the Crown to the Prize Court laying down regulations for the capture, etc., of vessels, and will be construed subject to the strong presumption that they are not inconsistent with International Law. Should such inconsistency be irremediably pronounced, then International Law will prevail.

[1] See p. 35.

It must always be remembered that Orders in Council, however otherwise inconsistent with International Law, are binding on a Prize Court if retaliatory (cf. the *Fox*).

25. The conclusions stated above may be reached by another road. It was contended by Lord Erskine in the House of Lords,[1] in a debate on the same series of Orders in Council as was discussed in the *Fox*, that by the Common Law of England the law to be administered in a Prize Court is the law of nations. Therefore an Order in Council cannot in the event of a conflict be preferred to International Law, which is the ordinary law of a Court of Prize. If viewed from this angle the question really resolves itself into this: whether there is a power inherent in the prerogative to legislate for a Prize Court, such legislation supplanting so much of the unenacted law of the Court as is inconsistent with it in the same and as ample a manner as an Act of Parliament supplants Common Law. The answer would seem to be in the negative. **Erskine on Orders in Council.**

Finally, it should be noted that, in spite of certain *dicta* to the contrary, an Act of Parliament, even though in conflict with International Law, would to-day be regarded as binding upon the Court of Admiralty in its Prize, and *a fortiori* in its Instance, jurisdiction.

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[1] Cobbett's Parl. Debates, Vol X, p. 929.

CHAPTER III.

International Law and Acts of Parliament in Ordinary Courts.

Anglo-American Telegraph Case, 1877.

26. There is little difficulty in determining the position of Acts of Parliament in the ordinary Courts of the land if and when they are in conflict with International Law.

The case of the *Direct United States Cable Company v. Anglo-American Telegraph Company*[1] is instructive. The appellants appealed to the Judicial Committee of the Privy Council against an injunction granted by the Supreme Court of Newfoundland restraining them from infringing certain rights conferred upon the respondents by the Act 17 Vic., c. 2. The appellants had laid a telegraph cable to a buoy more than thirty miles within Conception Bay, which lies on the east of Newfoundland between two promontories distant rather more than twenty miles, the average width of the bay being fifteen miles, the distance of the head of the bay from the two promontories being respectively forty and fifty miles. The judgment of the Board was

[1] 1877, 2 A.C. 394.

delivered by Lord Blackburn, and in the course of it occurs the following passage:—

"It does not appear to their Lordships that jurists and text-writers are agreed what are the rules . . . which would lead to the conclusion that a bay is or is not a part of the territory of the State possessing the adjoining coasts. . . . It seems to them that in point of fact the British Government has for a long time exercised dominion over this bay, and that their claim has been acquiesced in by other nations, so as to show that the bay has been for a long time occupied exclusively by Great Britain, a circumstance which in the tribunals of any country would be very important. And moreover (which in a British tribunal is conclusive) the British Legislature has by Acts of Parliament declared it to be part of the British territory, and part of the country made subject to the Legislature of Newfoundland. To establish this proposition it is not necessary to go farther back than to the 59 Geo. III, c. 38."

Speaking strictly, the above judgment, being merely an advice of the Privy Council, has no binding effect upon the Courts. Yet it would be idle to ignore the great authority which the opinion of so strong a Board, voiced by Lord Blackburn, must inevitably carry. Apart from the importance of the *dictum* on the power of the Legislature to bind the Courts, it is significant that their Lordships proceeded in the enquiry entirely upon the lines of Municipal Law. As was said:—"The

question raised in this case, and to which their Lordships will confine their judgment, is as to the territorial dominion over a bay of configuration and dimension such as those of Conception Bay above described." And this question they sought to decide by an examination primarily of *English* authorities—the Year Books, Coke, Hale, and previous decisions.

R. v. Keyn—Distinction between legal and diplomatic Remedy.

27. In the case of *R. v. Keyn*,[1] which will be dealt with more fully in another connexion,[2] the same view was clearly indicated by Sir A. Cockburn, C.J. He says: "Now, no proposition of law can be more incontestable or more universally admitted than that, according to the general law of nations, a foreigner, though criminally responsible to the law of a nation not his own for acts done by him while within the limits of its territory, cannot be made responsible to its law for acts done beyond such limits. . . . The rule must, however, be taken subject to this qualification—namely, that if the Legislature of a particular country should think fit by express enactment to render foreigners subject to its law with reference to offences committed beyond the limits of its territory, it would be incumbent on the Courts of such country to give effect to such enactment, leaving it to the State to settle the question of International Law with the Governments of other nations."

[1] 1876, 2 Ex. Div. 63.
[2] p. 86.

This admirably expresses the true modern view of the relation of International Law to the law of the land. It is for the Court to enforce an Act of Parliament, however outrageous it may seem or however repugnant to the plainest rules of International Law, while the injured nation is left to avail itself of its diplomatic remedy.[1]

28. Finally, the law has been laid down with great emphasis and precision by the Scottish Court of Session in the case of *Mortensen v. Peters*,[2] which was the case of a Danish subject prosecuted for fishing in contravention of a bye-law which extended the Scottish jurisdiction farther than one marine league from the coast. The defence was that the bye-law could not, on a sound construction, be held applicable to foreigners, and that the Court had no jurisdiction to apply an Act in contravention of International Law. The accused was convicted and sentenced; on appeal to a Full Bench, Lord Dunedin, Lord Justice-General,[3] said in giving judgment:— **Mortensen v. Peters, 1906.**

"I apprehend that the question is one of construction and of construction only. In this Court we have nothing to do with the question of whether the Legisla-

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[1] For a good illustration of this see the case of the *Costa Rica Packet*, quoted in 1 Oppenheim, p. 217.

[2] 1906, 8 Fraser 93.

[3] Now a Lord of Appeal in Ordinary.

ture has or has not done what foreign Powers may consider an usurpation in a question with them. Neither are we a tribunal sitting to decide whether an Act of the Legislature is *ultra vires* as in contravention of generally acknowledged principles of International Law. For as an Act of Parliament duly passed by Lords and Commons and assented to by the King it is supreme, and we are bound to give effect to its terms. . . . It is said by the appellant that all this must give way to the consideration that International Law has firmly fixed that a locus such as this is beyond the limits of territorial sovereignty, and that consequently it is not to be thought that in such place the legislature could seek to affect any but the King's subjects. . . . It is a trite observation that there is no such thing as a standard of International Law extraneous to the domestic law of a kingdom to which appeal may be made. International Law, so far as this Court is concerned, is the body of doctrine regarding the rights and duties of States which has been adopted and made part of the law of Scotland. . . ."

This luminous judgment places the matter beyond any doubt, and may be regarded as the best expression of the modern and prevailing view. The most interesting proposition contained in it is the last. Lord Dunedin's view that, from the standpoint of the Scottish Court, International Law is the sum of doctrine regarding the relation of States with each other which has been embodied in the Law of Scotland, logically leads to

the result that in case of a conflict the law of the land must prevail.[1]

Lord Kyllachy delivered a judgment to the same effect. He said:—

"Dealing first with the point of construction, the question of what the statutory enactment means, it may probably be conceded that there is always a certain presumption against the Legislature of a country asserting or assuming the existence of a territorial jurisdiction going clearly beyond limits established by the common consent of nations—that is to say, by International Law. Such assertions or assumptions are, of course, not impossible. The legislature of a country is not *quoad hoc* quite in the same position as its Courts of Law exercising or claiming to exercise a jurisdiction *ex proprio motu*. A Legislature may quite conceivably by oversight or even design exceed what an international tribunal (if such existed) might hold to be its international rights. Still there is always a presumption against its intending to do so. I think that is acknowledged. But then it is only a presumption, and as such it must always give way to the language used if it is clear, and also to all counter-presumptions which may legitimately be had in view."

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[1] It should be noted that just as an Act of Parliament may fall short in the obligations it imposes on British subjects in pursuance of the international duties of Great Britain so it may be in excess of those duties, as in the case of the Foreign Enlistment Act. But it is equally binding.

Late Mr. Justice Stephen on Acts of Parliament.

29. We may finally set the seal upon the above propositions by quoting some sentences from the late Mr. Justice Stephen[1]:—

"For instance, it is commonly said that by the Law of Nations the person of an ambassador is, generally speaking, inviolable, and by the Law of England it is a misdemeanour to violate his privileges; but if Parliament were to pass an Act putting ambassadors upon the same footing in all respects as private persons, the courts, in case of need, would apply that, like any other Act of Parliament, to any particular case that might arise." And the learned writer adds in a footnote on the same page:—

"If a Court of Justice avowedly refused to execute an Act of Parliament on the ground that it was opposed to some moral principle or to the law of nations, I think that the executive government would not carry out its orders, and that the judges would probably be impeached and punished. All that the courts could do in a direct conflict with Parliament would be to protest against its legislation. Judges who regarded it as intolerably wicked might resign or be removed, but they could not alter it."

Whether Act of 7 Anne gives exemption from criminal liability?

30. The reference to a conflict between the privileges accorded to diplomatic agents by International Law and those accorded them by the law of the land suggests a difficulty in the interpretation of the 7 Anne, c. 12. This

[1] Hist. of Crim. Law, Vol. II, p. 36.

Act exempts the diplomatic envoy from liability to "all suits and processes" of the country to which he is accredited. This means *prima facie* exemption from civil liability; and nothing is said in the Act which in express terms excludes the operation of the criminal law. The writer of the article on Constitutional Law in the Laws of England[1] assumes the position that International Law is a part of the law of England, and states the proposition of International Law that diplomatic agents are exempt from the criminal law of the country to which they are accredited, thus leaving it to be inferred that by English Law also they are exempt from the jurisdiction of the criminal courts.

The writer of the article on Criminal Law in the same work[2] declares for their immunity from criminal jurisdiction in a limited degree and places it upon the Act of Anne. "The Act," he says, "seems to contemplate a summary proceeding, without the intervention of a jury, and has probably no application to arrest on criminal process." And in the earlier part of the same article (p. 245) we find the following strong statement:—

"The exemption of ambassadors of foreign States, their servants and retinue, from the criminal jurisdiction of the country to which they are accredited, though asserted by writers on International Law, is not sanctioned by the English Courts or by any authority on

[1] 6 Hal. Laws of England, pp. 428-9.
[2] 9 Hal. Laws of England, p. 528.

English criminal law." For this statement the writer relies on Hale and on the well-known case of *Don Pantaleon Sa.* Some doubt, too, was cast upon the doctrine of immunity from criminal jurisdiction in the argument in the case of the *Magdalena Steam Navigation Co. v. Martin.*[1] In this case the duly accredited envoy of the Republic of Guatemala and New Grenada was sued for debts incurred by him. He pleaded his diplomatic immunity from process. In the course of his argument for the defence Mr. Bovill (afterwards Chief Justice of Common Pleas) quoted the following passage from Vattel:—

"The inviolability of a public minister, or the protection to which he has a more sacred and particular right than any other person, whether native or foreigner, is not the only privilege he enjoys; the universal practice of nations, moreover, allows him an entire independence of the jurisdiction and authority of the State in which he resides."

In answer the following question was put by Wightman, J.:—

"Does not that go rather too far? For it would entitle to indemnity in criminal as well as in civil cases." The question was not dealt with by counsel.

It is submitted that diplomatic envoys have no immunity from the criminal jurisdiction of this country given them by the Act of Anne. An exclusion of juris-

[1] 1859, 28 L.J.Q.B. 310.

diction should be express and precise, and cannot be presumed; and, indeed, the well-known maxim of construction would seem to apply here, *expressio unius exclusio alterius*. On the other hand, it might be argued that there is a presumption that the Legislature intends to give effect to the rules of International Law. But such presumption could be rebutted, as Lord Kyllachy stated in *Mortensen v. Peters* (quoted above), by evidence of a countervailing intention, gathered from the construction of the statute. Upon the whole, then, it seems that the Act itself gives diplomatic envoys no such immunity as has sometimes been claimed.

So much for the immunity in so far as it rests upon the Act. But it has been urged that the Act does not supplant but declares the Common Law. It is suggested, then, that the Courts should fall back upon the doctrine that International Law is embodied in the Common Law; that by International Law envoys have such privilege and therefore they must have it by the Common Law as well. This opens the larger question of the relation between International Law and the Common Law, which is dealt with in a later chapter.[1]

In practice, however, there is some evidence to show that the Courts accord this immunity, at any rate in summary proceedings. Reliable newspapers about two years ago contained an account of the arrest and subsequent discharge, for the misdemeanour of driving a

[1] See p. 75.

motor-car at an excessive rate, of the chauffeur to the late Baron Marschall von Bieberstein, then German Ambassador to this country. Similarly, a footman at the Italian Embassy was acquitted from a charge of being drunk and disorderly on proof of his identity. On the other hand, see the far earlier case of Mr. Gallatin's coachman,[2] in which this country seems not to have admitted that any immunity from criminal jurisdiction was conferred by International Law.

[2] 1 Oppenheim, p. 474.

CHAPTER IV.

Treaties which require an Act of Parliament for their Enforcement

31. We now pass to examine the question whether that part of International Law which rests upon conventions forms *proprio vigore* part of the law of the State which has subscribed to any such convention. So far as English law is concerned, the answer to the question is not entirely free from doubt. In German law, for example, the matter is comparatively simple. A treaty duly concluded is recognised and acted upon by the Courts if and when it has been promulgated in the *Reichsgesetzblatt*. In American law also the Courts act upon a treaty without further legislation,† as Dr. Westlake points out[1]:—

Place of Treaties in English and in American Law.

"In the United States it is otherwise (i.e., than in England), for the sixth article of the Constitution provides that 'all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or

† p. 111.

[1] 1906, 22 L.Q.R., p. 14.

law of any State to the contrary notwithstanding.' Hence, when the ninth article of the Jay Treaty in 1794 enabled the subjects of either country to hold lands in the other, and to sell and devise them as if they were natives, this stipulation at once took effect in the United States in favour of British subjects, repealing of itself so much either of the Common or Statute Law on the disabilities of aliens as stood in its way, while on our side of the Atlantic an Act of 37 Geo. III had to be passed. . . . This difference might seem to imply that the rule of International Law requiring that treaties shall be observed was incorporated in the law of the United States though not with that of England. But it is not so. The difference is merely that the Executive possesses in the United States a power of making law by treaty not paralleled in England."

Ratification of Treaties in England distinct from their approval by Parliament.

32. From the standpoint of the international lawyer a treaty, in order to be binding upon the parties who have set their hands to it, must fulfil two main conditions: it must (1) be signed by duly accredited representatives, and (2) it must be ratified. "Ratification," says Professor Oppenheim,[1] "is the term for the final confirmation given by the parties to an international treaty concluded by their representatives." Further, it is to be noted that International Law is not concerned to know or to enquire as to the organ of the State which

[1] I Oppenheim (1912), p. 553.

has concluded or ratified the treaty. so long as that organ is the proper and legal organ in which such power has been competently vested by the law of the State that makes the treaty. Now in England the question of ratification presents some difficulty. In English Law the treaty-making power resides *prima facie* in the Crown; and it would seem to follow from this that the proper body to accord ratification to a treaty would be the Crown in Council, i.e., the Privy Council. But the question cannot be so simply answered owing to the fact that there are clear rules of English Law which necessitate the intervention of Parliament before a treaty on certain matters can be binding upon British subjects.[1] Thus the writers of the article on Constitutional Law in the Laws of England make the following statement[2]:—

"In England there is no codified list of subjects upon which the Crown has power to bind the subject by treaty without parliamentary sanction. But where any reasonable doubt arises it is usual either to obtain statutory authority beforehand, or to stipulate in the treaty that the consent of the Legislature shall be obtained."

When may the Crown bind subjects by Treaty?

33. We shall now consider the cases in which the Crown can bind subjects by treaty, and those cases in which parliamentary intervention is necessary.

[1] But of course the ratification of a treaty must be kept distinct from its approval by Parliament and from the legislation which may be necessary to make it binding on British subjects.

[2] 6 Hal. Laws of England, p. 440 n(e).

We may begin with Blackstone, who says[1]:—

"It is also the Sovereign's prerogative to make treaties, leagues, and alliances with foreign States and princes. For it is by the law of nations essential to the goodness of a league that it be made by the sovereign power; and then it is binding on the whole community, and in England the sovereign power *quoad hoc* is vested in the King. Whatever contracts, therefore, he engages in no other power in the kingdom can legally delay, resist, or annul."

Maitland.

34. Maitland's comment upon this is simple and direct, and amounts to a flat contradiction.[2]

". . . We may, I believe, say that a treaty made by the King in general has no legal effect whatever. The King, as just said, can make peace and can make war, and the making of either will, of course, have important effects: whether an act be a laudable attack on a public enemy, or mere piracy, is one of the many questions that might thus be decided. Also it seems certain that as an incident to a treaty of peace the King may cede territory, may at all events cede territory acquired by him during the war. Exactly how far this power extends is a somewhat debatable matter, and I think it very doubtful whether the Queen can cede land subject to the British Parliament except in a treaty of peace. Could

[1] Commentaries, I. C.7.11.

[2] Constitutional History, p. 424.

she sell Jersey, Guernsey, or Kent to France? I much doubt it."

He then goes on to illustrate his proposition by reference to the Extradition Acts, which were necessary in order to enable the Crown to give effect to its treaties. And indeed we find a long list of Acts of Parliament passed in order to enable the Crown to perform obligations without which it would have been unable to perform. We may notice that some of these treaties actually contain clauses in which the Crown through its representatives engages to propose the necessary legislation, as in the case of the cession of Heligoland in 1890 made "subject to the assent of Parliament."

Treaties which have been rendered effective by Act of Parliament.

35. Legislation has been necessary in various fishery conventions, notably the treaty with America in 1818, "to enable Her Majesty to make regulations with respect to Newfoundland according to a convention made with the United States," as is stated in the preamble. The Treaty of Versailles with France in 1783 was effectuated by the Act 28 Geo. III, c. 35.

It is at least not certain whether the Declaration of London would have required an Act of Parliament in order to make it binding on all our Courts.[1] As a treaty, duly signed, a Court of Prize would, it seems, have been bound by its provisions had it been ratified. Formal ratification, however, has not taken place. An Order

[1] See N. Bentwich, The Declaration of London, p. 126.

in Council of August 20th, 1914, decreed that, subject to certain restrictions and modifications specified in the Order, the Declaration should be put in force as if it had been ratified, and further, that the General Report of the Drafting Committee should be taken as an authoritative statement of the intention of the Declaration in all Prize Courts (s. 6). The true position therefore seems to be that while the Declaration of London, as an unratified agreement, is not binding, certain Orders in Council, incorporating in fact its main provisions, are, as *Municipal Law*, of authority in Courts of Prize.[1]

Sir W. Anson on the extent of the Prerogative.

36. The late Sir W. Anson,[2] too, had grave doubts as to the extent of the prerogative of the Crown. He expresses his view thus:—

"It would seem to follow from the general principles of our constitution that a treaty which lays a pecuniary burden on the people or which alters the law of the land needs parliamentary sanction. If it were not so the King, in virtue of this prerogative, might indirectly tax or legislate without consent of Parliament."

His view of the matter may be embodied in the following propositions:—

(*a*) That as regards cession of territory, the tendency has been in the direction of obtaining parliamentary sanction in the form of an Act.

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[1] Subject, it would seem, to their conformity with International Law, see above, p. 46.

[2] Anson on the Constitution, III, p. 103, Edition 1908.

(*b*) That there is some authority for the view that territory acquired by conquest may even in time of peace be ceded in virtue of the prerogative, and territory for which the Crown in Council legislates. (Cf. Maitland's view, quoted above.)

(*c*) That at the close of a war the prerogative of cession is wider than in time of peace.

On the occasion of the cession of Heligoland in 1890 the Government was advised to embody in the treaty a clause making the cession conditional upon the assent of Parliament.[1] There have been many cases of cession of Indian territory in virtue of the prerogative alone; but these the learned writer keeps apart.

But, on the other hand, he points out that even treaties ceding territory at the end of a war may affect private rights in innumerable ways. Thus they may effect a change of nationality of all those persons who do not exercise the right of option nowadays contained in most treaties of cession; they may change the tenure of land by subjecting the ceded persons to a new law. Again, where the territory ceded was ceded to and not by the Crown, the effect of the cession might be to impose a new tax on the subjects of the Crown. All this makes it difficult to say with any certainty that even treaties consequent upon war can be made in virtue of the prerogative alone. Thus in the place of the anti-

[1] The same course was followed in the case of some cessions to France in 1904.

thesis between treaties made in time of peace, which do, broadly, require an Act of Parliament, and treaties made consequent upon a war, which, broadly, do not, the antithesis seems to be one between those treaties which affect private rights and those which do not. This view is clearly stated both by the late Dr. Westlake and the writers of the article on Constitutional Law in the Laws of England. The former says[1]:—

"The English Courts must enforce rights given by International Law . . . subject to the rules that the King cannot divest or modify private rights by treaty (with the possible exception of treaties of peace, or treaties equivalent to those of peace), and that the Courts cannot question Acts of State."

And the second authority takes this view[2]:—

"Thus, though treaties relating to war and peace, the cession of territory, or concluding alliances with foreign Powers, are generally conceded to be binding upon the nation without express parliamentary sanction, it is deemed safer to obtain such sanction in the case of an important cession of territory. And where taxation is imposed or a grant from public funds rendered necessary, or where the existing laws of trade or navigation are affected, or where the private rights of the subject are interfered with by a treaty concluded in time of peace, it is apprehended that the previous or subsequent

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[1] 1906, 22 L.Q.R. 26.

[2] 6 Hal. Laws of England, p. 440.

consent of Parliament is in all cases required to render the treaty binding upon the subject and enforceable by officers of the Crown."

37. The cases that deal with the point are few and their pronouncements neither entirely clear nor satisfactory. The *Parlement Belge*[1] was the case of a Belgian steamship sued by the owner of the steam-tug "Daring" for damages for collision caused by her bad and negligent navigation. Counsel appeared on behalf of the Crown to raise the objection that in virtue of a convention made between Her Majesty and the King of the Belgians the character of a public vessel was conferred on the "Parlement Belge." Counsel for the Crown laboured to show that all matters affecting foreign relations, all matters of the recognition of the status of a foreign person or thing, were Act of State within the power of the prerogative, and beyond question in an English Court.

The "Parlement Belge," 1879.

In the course of his judgment the learned President observed:—

"It is admitted that this convention has not been confirmed by statute; but it has been contended on the part of the Crown both that it is competent to her Majesty to make this convention and also to put its provisions into operation without the confirmation of them by Parliament. The plaintiffs admit the former but deny the latter proposition."

[1] 1879, 4. P.D. 129.

The learned President then quoted the classic passage from Blackstone set forth above,[1] and continued thus:—

"The learned writer, however, was certainly aware that this general proposition must receive some modification and restraint besides that which he has mentioned. Blackstone must have known very well that there was a class of treaties the provisions of which were inoperative without the confirmation of the legislature; while there were others which operated without such confirmation. The strongest instance of the latter, perhaps, which could be cited is the Declaration of Paris of 1856, by which the Crown in the exercise of its prerogative deprived this country of belligerent rights which very high authorities in the State and in the Law considered to be of vital importance to it. But this Declaration did not affect the private rights of the subject; and the question before me is whether this treaty does affect private rights, and therefore required the sanction of the legislature."

The case was again argued on appeal[2] before Brett, James, and Baggallay, L.JJ. Their Lordships allowed the appeal on the ground, however, that the "Parlement Belge" was the public property of the Belgian State, and so shared the general immunity from arrest of such property. The success of the appeal, therefore, rested

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[1] See p. 62.

[2] 1880, 5 P.D. 197.

upon a point other than that of the competence of the Crown to make such a treaty without the intervention of Parliament. It is to be regretted that we have not had the inestimable benefit of the opinion of so strong a Court upon this question. It is, however, sufficiently clear from the remarks of Sir Robert Phillimore that he accepted the distinction that has been drawn between those treaties which touch private rights and those which do not, and held that the former category could not be binding on an English court without legislation.

38. *Walker v. Baird*[2] was an appeal to the Judicial Committee of the Privy Council from the Supreme Court of Newfoundland against a judgment in favour of the respondents in an action for trespass and detinue against the captain of H.M.S. "Emerald" (the present appellant) for wrongfully entering the respondent's lobster factory and keeping possession of the same for a long time, etc., etc., on the ground that he had been entrusted by the Admiralty with the task of putting into force an agreement made between Her Majesty the Queen and the Government and Republic of France. The defence was Act of State, and judgment was given for the plaintiff. It was on this point that the appeal turned and was decided, although the question was raised as to how far the Crown by treaty can bind its subjects, as appears from the following observations of

Walker v. Baird, 1892.

[2] 1892, A.C. 491

Lord Herschell, C., who gave the opinion of the Privy Council:—

"The learned Attorney-General, who argued the case before their Lordships on behalf of the appellant, conceded that he could not maintain the proposition that the Crown could sanction an invasion by its officers of the rights of private individuals whenever it was necessary in order to compel obedience to the provisions of a treaty. The proposition he contended for was a more limited one. The power of making treaties of peace is, as he truly said, vested by our Constitution in the Crown. He urged that there must of necessity also reside in the Crown the power of compelling its subjects to obey the provisions of a treaty arrived at for the purpose of putting an end to a state of war. He further contended that, if this be so, the power must equally extend to the provisions of a treaty having for its object the preservation of peace; that an agreement which was arrived at to avert a war which was imminent was akin to a treaty of peace, and subject to the same constitutional law. Whether the power contended for does exist in the case of treaties of peace, and whether, if so, it exists equally in the case of treaties akin to treaties of peace, or whether in both or either of these cases interference with private rights can be authorised otherwise than by the legislature, are grave questions upon which their Lordships do not find it necessary to express an opinion."

39. It seems, then, that the authorities upon which we have to rely in attempting to frame a clear proposition of law on this difficult matter are, in many instances, uncertain and hesitating. We are driven, therefore, to say this: that whatever be the theories of the text-book, these have been rendered of academic rather than of practical importance by the undoubted modern practice of incorporating all treaties affecting private rights in Acts of Parliament, and so enabling the Crown to perform to the full all its contractual obligations with foreign States. We may go a step further, and say that so difficult to draw is the line between those treaties which affect private rights and those which do not, and so difficult is it to imagine a treaty which does not, that in most cases the passing an act by the legislature would seem the more correct and advisable course.

Difficulty of deciding which Treaties do, and which do not affect private rights.

Now, if the above reasoning be correct, we are in a far better position to answer the question with which we started: How far is International Law part of English law in respect of treaties? The reply is in the negative as regards those which affect private rights and existing statutes; so that in each case, when a treaty or convention made between the Crown and a foreign State imposes some obligation upon the subjects of the Crown, and an Act of Parliament is passed in order to render effectual its provisions, the subjects of the Crown perform such obligations because they are commanded to do so by their own law, and in no other way whatsoever.

We may conclude this part of the subject with some general observations of Professor Oppenheim[1]:—

"It must be specially observed that the binding force of a treaty concerns the contracting States only, and not their subjects. As International Law is a law between States only and exclusively, treaties can have effect upon States only. If treaties contain stipulations with regard to rights and duties of the contracting States' subjects, courts, officials, and the like, these States have to take such steps as are necessary, according to their Municipal Law, to make these stipulations binding upon their subjects, courts, officials, and the like. It may be that, according to the Municipal Law of some countries, the official publication of a treaty concluded by the Government is sufficient for this purpose; but in other countries other steps are necessary, such as, for example, special statutes to be passed by the respective Parliaments."

Effect of 23 (h) of Fourth Hague Convention on Disability of Alien Enemy in English Court.

40. Since the above was written the full Court of Appeal (consisting of Lord Reading, C.J., Lord Cozens-Hardy, M.R., and Buckley, Kennedy, Swinfen Eady, Pickford, and Phillimore, L.JJ.) has delivered its judgment on certain matters arising out of the present war. The judgment contains an exhaustive review of the law relating to the disabilities of alien enemies to sue in the King's Courts that are imposed by the Common Law. It then continues as follows:—

[1] 1 Oppenheim, p. 562 (1912).

"Having stated the Common Law of England in regard to the question of the alien enemy's rights to sue in our Courts of Law, we have now to consider whether the Hague Convention of 1907 on the Laws and Customs of Land Warfare, Article 23 (h) of c. 1 of s. 2 of the Annex . . . has any bearing upon the questions we have to determine. . . .

"It is particularly forbidden . . . to declare abolished, suspended, or inadmissible the right of the subjects of the hostile party to institute legal proceedings."

As a fact, the Court came to the conclusion that this prohibition applied only in the case of a military occupation, and merely placed a limit upon the authority exercised by the commander over the inhabitants of the occupied territory. But what is of importance is the impression conveyed by the terms of the judgment that the only question before the Court was whether the Hague Convention applied to the general disability of an alien enemy, or whether it had merely the restricted application stated above; and that, if the Court had been of opinion that it possessed the wider meaning, it would have acted upon it as upon a rule of English Law. That this impression is not without foundation is favoured by the order in which the subject is treated—in close connexion with and following upon the discussion of alien enemy disabilities in English Law.

If this view is correct, then the important and difficult question might arise whether or no the Convention would have been without more and of itself binding

upon the Court. It is at least doubtful whether the whole of Article 23 (h) could be acted upon in an English Court without legislation. But, in view of the fact that the Court of Appeal refused to place the wider interpretation upon the Convention, it becomes unnecessary to attempt to solve the problem. Even if this wider meaning had been given the Article in question, so great a change in Municipal Law would have required an Act of Parliament. Lastly, it should be added, the Court seems to have assumed, for the purposes of the discussion, that the Fourth Hague Convention was binding as between the belligerents.[1]

[1] See p. 45.

CHAPTER V.

International Law and the Common Law of England.

41. We now approach the most difficult branch of the enquiry. We have seen that it is not true to say that International Law is part of the law of the land in the sense that it prevails over an Act of Parliament which sets aside its rules, whether in an ordinary Court of the land or in a Prize Court; also that it cannot be said to be part of the law of the land in the sense that treaties or conventions are in themselves binding upon our Courts, except in Courts of Prize. Therefore the next question is whether that part of International Law which rests upon the custom of States as opposed to that which rests upon treaties—in other words customary as opposed to conventional International Law—can be truly and accurately said to be part of the law of the land where no Act of Parliament embodies it in itself. Is customary International Law part of the Common Law?

International Law no longer rests on Law of Nature.

In this enquiry there are two propositions which we should bear well in mind:—

(*a*) That to the lawyers of the eighteenth and the

early part of the nineteenth century, the Common Law was still the expression of the rules of "right reason" or "natural justice." Even Lord Stowell and Sir Robert Phillimore in passages already quoted lay it down as the plain duty of a judge to disregard an Act of Parliament repugnant to those principles of right on which the Common Law rested.

(*b*) That until some sixty years ago the Naturalistic conception of International Law was not clearly separated from the Positivistic. International Law was still regarded as consisting of principles of right and moral action for States, resting in the main upon the *a priori* speculations of jurists. In other words, the conception of the law as it is was not clearly separated from the conception of the law as it ought to be. These *a priori* speculations were to some extent supported by evidence of practice, but it is certain that this played the lesser part. The combined effect of these two propositions is that since International Law rests upon rules of true morality, and since the Common Law is the embodiment of such rules, International Law must be part of the Common Law. Accordingly we are able to see the changing notion of the basis of International Law reflected in the judgments of the English Courts. We shall see how the early decisions of the eighteenth century declare in sweeping terms that International Law is part of the Common Law in its full extent, while those of more modern times accept the proposition only with many safeguards and hedged around with the most care-

ful limitations, until we reach the culminating point, the judgment in the *West Rand Central Gold Mining Company v. Rex*,[1] which may be described as the *locus classicus* on the subject.

42. If we take as our starting point the Act of 7 Anne we find that the opinion was held by eminent lawyers of the day that the Act was not intended to make new law. It merely declared the Common Law.

Act of 7 Anne and the Common Law: Triquet v. Bath, 1764

Triquet v. Bath[2] was a case which turned on the question whether the defendant was a domestic servant of a foreign minister, and whether he was entitled to the diplomatic privilege. In the course of the argument "Mr. Blackstone observed that the Act of Parliament of 7 Anne c. 12 was not any alteration of the law of nations from what it was before: for that ambassadors and their attendants were, by the general law of nations, intitled to the same privilege," and Lord Mansfield, C.J., remarked: "This privilege of foreign ministers and their domestic servants depends upon the law of nations. The Act of Parliament of 7 Anne c. 12 is declaratory of it. All that is new in this Act is the clause which gives a summary jurisdiction for the punishment of the infractions of the law. . . . I remember in a case before Lord Talbot of *Buvot v. Barbuit* . . . . these questions arose and were discussed . . . whether being a trader was any objection against allowing privilege to a minis-

[1] 1905, 2 K.B. 391.
[2] 1764, 3 Burr. 1478.

ter, personally . . . whether an agent of commerce or even a consul was entitled to the privilege of a public minister . . . what was the rule of decision: the Act of Parliament, or the Law of Nations. Lord Talbot declared a clear opinion 'that the Law of Nations in its full extent was part of the Law of England, that the Act of Parliament was declaratory; and occasioned by a particular incident. That the Law of Nations was to be collected from the practice of different nations and the authority of writers.' Accordingly he argued and determined from such instances and the authority of Grotius, Barbeyrac, Bynkershoek, Wicquefort, etc., there being no English writer of eminence upon the subject.

"I was Counsel in this case and have a full note of it. I remember, too, Lord Hardwicke's declaring his opinion to the same effect, and denying that Holt, C.J. ever had any doubt as to the Law of Nations being part of the law of England, upon the occasion of the arrest of the Russian Ambassador."

Heathfield v. Chilton, 1767.

43. The case of *Heathfield v. Chilton*[1] also turned upon a point of diplomatic privilege. *Per* Lord Mansfield, C.J.:—

"The privileges of public ministers and their retinue depend upon the Law of Nations; which is part of the Common Law of England. And the Act of Parliament of

[1] 1767, 4 Burr. 2016.

7 Anne c. 12 did not intend to alter nor can alter the Law of Nations . . . the Law of Nations will be carried as far in England as anywhere, because the Crown can do no particular favours, affecting the rights of subjects, in compliment to public ministers, or to satisfy their points of honour."

44. Blackstone, who, it is interesting to note, had been engaged in *Triquet v. Bath*, expresses the same view in his Commentaries.[1] "The Law of Nations," he says, "(whenever any question arises which is properly the object of its jurisdiction) is here adopted to its full extent by the Common Law, and is held to be a part of the law of the land. And those Acts of Parliament which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered to be introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom, without which it must cease to be a part of the civilised world." **Blackstone.**

45. In the next case the question how far a consul shares diplomatic immunities was under discussion, that of *Viveash v. Becker*.[2] Lord Ellenborough, C.J. in his judgment said:—"Every person who is conversant with the history of this country is not ignorant of the **Viveash v. Becker, 1814.**

[1] Book IV, s. 67.
[2] 1814, 3 M. and S. 284.

occasions which led to the passing of the Statute of 7 Anne c. 12. An ambassador of the Czar had been arrested and had put in bail; and this matter was taken up with considerable inflammation and anger by several of the European Courts. In order to soothe the feelings of these Powers the Act of Parliament was passed, in which it was thought fit to declare the immunities and privileges of ambassadors and public ministers from process. . . There is not, I believe, a single writer on the Law of Nations, nor even of those who have written looser tracts on the same subject, who has pronounced that a consul is a public minister, and unless he be such he is not within the comprehension of the Act of Parliament. It has been very truly said that the Act is declaratory of the Common Law and of the Law of Nations, and hence it has been argued that he may be entitled to this privilege by the Law of Nations, though he be not expressly designated in the Act."

The learned Chief Justice then examined the authorities and found that no such immunity was given by the Law of Nations.

Act of Anne declaratory of Common Law.

46. For the purpose of comment, the above cases, as they all deal with the question of diplomatic immunities, may be taken together.

All the best opinion seems agreed that the Act of Anne is declaratory of the Common Law. The explanation given by Lord Ellenborough as quoted above is that the Act was passed in order to soothe the out-

raged feelings of the Czar. Yet the point should not be ignored that it is a not unusual feature of English law that where an Act of Parliament is framed ostensibly in order to declare what is the Common Law, the passing of the Act has generally been preceded by some doubts in the mind of the judges, or by some conflict between different organs of the State, which the Act is designed to settle. It is necessary to refer only to two such famous instances as the 3 and 4 Vict. c. 9, which settled the controversy between the Courts and the House of Commons arising out of the case of *Stockdale v. Hansard*.[1] Hansard, on being sued for libel in respect of statements made about the plaintiff Stockdale contained in certain reports, set up as defence that these were published by order of the House of Commons. The Court of Queen's Bench gave judgment for the plaintiff; to which the Commons retorted by committing for contempt of their privilege the sheriff's officer who put in execution upon Hansard. The Act which followed made an order of the House a good defence to such publication, if accompanied by certificate and affidavit. But the important point is that it required an Act of Parliament to obtain this settlement. A second famous example is provided by the Territorial Waters Jurisdiction Act, which states in its preamble that the jurisdiction of the Crown "extends, and *has always extended*, over the open seas adjacent to the

[1] 9 A. and E. 1.

coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions." Yet it must be remembered that the passing of the Act was preceded and indeed occasioned by the acute differences of opinion among the judges of the full Court who tried the case of *R. v. Keyn*.

But on the other hand, in view of the repeated statements of our Courts in the cases just quoted, and of the more recent case of *Service v. Castaneda* (2 Coll. 56), in which Vice-Chancellor Knight-Bruce expressly affirmed the declaratory nature of the Act, it would be unsafe to lay down so broad a proposition as that the law relating to diplomatic envoys is contained in the Act, and that no Court could look behind it.[1] There is authority for saying that where the Act is silent the Common Law can be called in aid and this view is countenanced by the decision in *Macartney v. Garbutt* (1890, 24 Q.B. 368). It is at least doubtful whether the Common Law gave diplomatic envoys accredited to

[1] *Cf.* also *De Haber v. Queen of Portugal* (1851, 17 Q.B. 171), in which the Act of Anne was held to be declaratory of the Common Law and the Law of Nations, and the immunity of a foreign sovereign upheld as existing at Common Law; and *Magdalena Steam Navigation Co. v. Martin* (1859, 2 E. and E.), in which quotations from text-writers were relied upon to prove the Law of Nations in regard to diplomatic immunities.

But it is to be noted that this line of cases is concerned entirely with the immunities of foreign sovereigns, their envoys, and public property, a principle of such antiquity and general acceptance that every civilised State must be deemed to have recognised and acted upon it in its practice.

this country immunity from the *criminal jurisdiction*, the principal authority for such a statement being a single passage in Blackstone (1 Comm. 253).

The Doctrine of "Assent."

47. It should be noted, further, that there is no mention in these judgments of a word frequently found in the later decisions—the word "assent." For the judges of those days International Law could rest entirely on an *a priori* basis, or on an *a priori* basis fortified by a modicum of practice. It would seem that they did not require a uniformity of practice even among a substantial majority of States, still less did they require the assent of the State of whose law the international rule under discussion was said to form part. The question of assent will be dealt with more fully when we proceed to the more recent cases.†

Wolff v. Oxholm, 1817.

48. In the case of *Wolff v. Oxholm*[1] the right of confiscation by the authorities of one belligerent of the private property of subjects of the other was reviewed.

Wolff, a British subject, and Oxholm, a Dane, were in partnership together. A debt of £2,861 was due from Oxholm to Wolff. On the outbreak of war between Great Britain and Denmark, the Danish authorities ordered the payment into the State treasury of all monies due from Danish to British subjects. In accordance with this order Oxholm paid in the £2,861. Upon

† p. 100.

[1] 1817, 6 M. and S. 92.

an action instituted in the English Courts by Wolff for the payment of the money, the question turned upon whether or no the payment to the Danish authorities was a good discharge.

Per Lord Ellenborough, C.J.:—

"But it was contended that this ordinance was a proceeding founded upon and conformable to the Law of Nations, and that as the defendant paid the debt to the person appointed by the ordinance to receive the confiscated debts he has a good discharge as to the debt itself according to the Law of Nations, to which the municipal courts of this country, as well as of all others, ought to give effect." The learned Chief Justice then proceeded to examine the authority of the text-writers in favour of such a right of confiscation. After quotations from the leading authorities, including Grotius and Vattel, he came to the conclusion that there was no such right given by any rule of International Law. He accordingly concluded his judgment in these words:—

"We think our judgment would be pregnant of mischief to future times if we did not declare that in our opinion this ordinance, and the payment to the commissioners appointed under it, do not furnish a defence to the present action; and if they cannot do this of themselves, neither can they do so by the aid of the proceedings in the Danish Court. The parties went into that Court expecting justice, according to the then existing laws of that country, and are not bound by the quashing of their suit, in consequence of a subsequent ordinance,

not conformable to the usage of nations and which, therefore, they could not expect, nor are they or we bound to regard."

This judgment raises questions of much difficulty. It undoubtedly proceeds upon the principle that International Law is part of the Common Law, and will be applied in a proper case. Nor would it be easy to say here that the Court while nominally following what it conceived to be the true doctrines of International Law has in effect followed an English rule, as was so often the case in Lord Stowell's judgments. The mind of the Court was directed to an investigation of the true rule of International Law on a certain point, and finally gave the opinion that the Danish Government had been in error in its view of the law. We are therefore bound to admit that in this case the Court did act upon the principle that International Law is part of the law of the land. But we must beware of a confusion, for once the judgment is given and complete it is *functus officio* so far as the Law of Nations is concerned. It cannot add to nor detract from that law. It is a precedent and authoritative decision of English law, and should a similar point come before the Courts on a future occasion the decision in this case will be authoritative and in point, and of value only so far as it declares Municipal Law and not International.

It is worthy of note that the judgment proceeded upon two distinct grounds (1) that an Ordinance commanding such a confiscation was contrary to International

Law, and (2) that our Courts could take no notice of the penal law of a foreign country.[1] Mr. Dicey, in his "Conflict of Laws," seems to put the judgment on this second ground.[2]

R. v. Keyn, 1876.

49. We now come to the great case of *R. v. Keyn*,[3] in which much is to be found concerning the true relation of the Law of Nations to English Law. The real issue was this. Has an English Court the power to give effect for the first time to a proposition of International Law, such proposition having been previously embodied neither in an Act of Parliament nor in a judicial decision of a competent Court?

The prisoner was indicted at the Central Criminal Court for manslaughter. He was a foreigner and in command of a foreign ship, passing within three miles of the shore of England on a voyage to a foreign port; and whilst within that distance his ship ran into a British ship and sank her, whereby a passenger on board the latter ship was drowned. The facts of the case were such as to amount to manslaughter by English law. The question of law as to jurisdiction went up to the Court for Crown Cases Reserved. A majority of the whole Court held that the Central Criminal Court had no jurisdiction to try the prisoner.

The argument directed to the Court was to the effect

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[1] At p. 319.
[2] Conflict of Laws, p. 461.
[3] 1876, 2 Ex. D. 63.

that the Act conferring jurisdiction upon the Central Criminal Court conferred all such jurisdiction by virtue of the rule of International Law which gives a State a jurisdiction over all its territory and over a space of one marine league measured outwards from low-water mark. The questions, then, for the Court were two, namely:—

(*a*) Whether such a rule of International Law existed;

(*b*) Whether even if it did, it would be sufficient to give the Court jurisdiction without an Act of Parliament or a previous decision of an English Court to support it. The *ratio decidendi* differed in one case from another. Some of the judges held that in their opinion there was no such rule of International Law, others that even if there were, no English Court could act upon it without the intervention of Parliament. The following are extracts from the more important judgments:—

50. *Per* Sir R. Phillimore: **Judgment of Sir R. Phillimore.**

"It being then in my opinion clear that the jurisdiction to try the prisoner was not derived from the Common Law, or the Statute Law, or the Law of the High Court of Admiralty, what law did render the English Court competent for this purpose?

"As I understand the contention on behalf of the Crown, the answer is, International Law, or in other words, England has become entitled to include within her realm a marine league of the sea, and therefore has jurisdiction over a foreign vessel within that limit.

"It is indeed a most grave question whether, if this statement of International Law were correct, nevertheless an Act of Parliament would not be required to empower the Court to exercise jurisdiction; but waiving this consideration for the present it becomes important in this view of the question to consider the sources from which we are to derive this doctrine of International Law."

The learned President then examined the opinions of the text-writers and came to the conclusion that these gave no ground for the proposition that a State had a jurisdiction over the marine league as distinct from the right to exercise precautionary and protective measures over its adjacent waters. It is noteworthy that he expressed no opinion of his own as to the necessity for an Act of Parliament conferring such jurisdiction on the Court, even if such jurisdiction had been found to have been well established in International Law. There are indications, both from the language he uses in the above passage and from his remarks in the *Parlement Belge* that he inclined to the view that the rights conferred or the duties imposed by International Law could not effectually bind the English Courts without the intervention of the legislature.

Jurisdiction given by International Law.

51. Lindley, J., placed the jurisdiction of the Court, if any existed, upon the two Acts of 28 Hen. VIII, c. 15, and 39 Geo. III, c. 37. "The jurisdiction," he said, "throughout is assumed to have been as extensive as it

could be. The question therefore is, how extensive could it be? This brings us at once to the consideration of the limits of the legislative power of this country or of the jurisdiction of its courts, and there being no other limit than that set by International Law, these limits must be sought for amongst the recognised authorities on that branch of jurisprudence."

After a full examination of these authorities the learned judge came to the conclusion that by International Law a plenary as opposed to a restricted jurisdiction for defensive purposes existed, and continued thus:—

"For these reasons I have arrived at the conclusion that speaking generally, and subject to such exception, if any, as can be established, the general language of the statutes 28 Henry VIII, c. 15, and 39 George III, c. 37, may properly be construed as having made punishable by English law all offences committed within the conventional limit of three miles from our shores."

52. Denman, J., was in favour of upholding the conviction on the twofold ground that the manslaughter was committed on board a British ship, and therefore cognisable by the British Courts, and also because the Central Criminal Court had jurisdiction over the marine league. **Denman and Grove, JJ.**

Grove, J., was for affirming the conviction on the ground that the leading authorities on International Law

were agreed as to the right of the State to the three-mile jurisdiction.

Brett, L.J

53. Brett, L.J., proceeded upon the same lines as Lindley, J. He took the two statutes as his starting point, and then proceeded to examine the extent of the jurisdiction which International Law allowed them to confer. He agreed that the consent of States is essential to the establishment of a rule of International Law; but unlike Cockburn, C.J., he regarded the statements of text-writers as evidence of such consent. Indeed, in one passage he well puts the distinction between the Naturalist and the Positivist Schools:—

"On the one side, it is said, that among heads of evidence of such consent the writings of jurists of different nations are to be received, and that a common consent of them all, or of substantially all of them, to a reasonable proposition, may be accepted as proof of the common consent of nations, though the proposition has not yet been brought for the purposes of action before the governments of nations. On the other side it is said that the propositions of such writers are theories, not binding unless and until they have been adopted by governments, and that such adoption must be shown by some express declarations of governments, or by some acts of governments. If the latter be true, it is obvious that there can be no law on any particular point until it has arisen in fact for the treatment of governments."

[1] Afterwards Lord Esher, M.R.

On investigation the learned Lord Justice found that the statements of text-writers afforded complete evidence of such consent, and finally affirmed the conviction.

54. Lord Coleridge, C.J., was in favour of affirming the conviction on the main ground that the jurisdiction existed in English Law. He says some instructive things upon the nature and basis of International Law. For example:—"The Law of Nations is that collection of usages which civilised States have agreed to observe in their dealings with one another. What these usages are, whether a particular one has or has not been agreed to, must be matter of evidence. Treaties and Acts of State are but evidence of the agreement of nations, and do not in this country at least, *per se*, bind the tribunals. Neither certainly does a consensus of jurists, but it is evidence of the agreement of nations on international points; and on such points, when they arise, the English Courts give effect, as part of English law, to such agreement." **Lord Coleridge, C.J.**

It is difficult to understand the propositions set out above. If even the assent of nations as opposed to the theoretical speculations of text-writers are not binding upon English Courts, it is hard to see how the Courts give effect "to such assent when such points arise for decision." The learned Judge, it seems, takes the more serious view of the text-writers as evidencing what is International Law.

Sir A. Cockburn, C.J.

55. Sir A. Cockburn, C.J., was not inclined to attach much importance to the opinion of the text writers, especially in view of the great divergence among them as to the basis of the three-mile jurisdiction, and as to its limitations. He clearly takes the view that writers on International Law are more often expressing a pious aspiration than stating what is in fact the practice of States. "For even if," he says, "entire unanimity had existed in respect of the important particulars to which I have referred in place of so much discrepancy of opinion, the question would still remain, How far the law as stated by the publicists had received the assent of the civilised nations of the world. For writers on International Law, however valuable their labour may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding the law must have received the assent of the nations who are to be bound by it. The assent may be express, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage. . . . In the absence of proof of assent, as derived from one or other of these sources, no unanimity on the part of theoretical writers would warrant the judicial application of the law on the sole authority of their views or statements. Nor in my opinion would the clearest proof of unanimous assent on the part of other nations be sufficient to authorise the tribunals of this country to apply without Act of Parliament what would practically amount to a new law. In so doing we should be unjustifiably usurping the pro-

vince of the legislature. The assent of nations is doubtless sufficient to give the power of parliamentary legislation in a matter otherwise within the sphere of International Law; but it would be powerless to confer without such legislation or jurisdiction beyond and unknown to the law, such as that now insisted on. . . . It is said that we are to take the statements of the publicists as conclusive proof of the assent in question. . . . I demur altogether to this position. I entertain a profound respect for the opinion of jurists when dealing with matters of judicial principle and opinion, but we are here dealing with a question not of opinion, but of fact, and I must assert my entire liberty to examine the evidence and see upon what foundation these statements are based."

The effect of this judgment would seem to be that in the learned judge's opinion, the assent of other nations could have no effect upon the Courts of this land in the absence of the assent of this country by treaty, by practice, or by a previous judicial decision. The only way in which a rule of practice adopted by other nations and not shared by us could be made binding upon the Courts is by Act of Parliament.

56. This is the modern position, and is practically the same as that advanced by Lord Alverstone, C.J., in the *West Rand* case, which will be discussed later. It clearly rests upon a different conception of the basis of International Law. Where the basis of this was mainly moral and *a priori* speculation founded upon what were

The Modern Rule: that the Assent of this Country in practice is required.

held to be the rules of absolute right, it was obvious that International Law must be part of the Common Law, since the Common Law was held to rest upon such rules of morality and right. But when International Law came to be conceived as the sum of practice, and its reasoning to be *a posteriori*, then it became necessary for English judges to introduce the element of assent. And for them the assent[1] required is of the strictest sort. They are not, it seems, prepared to admit as a settled rule of International Law that which has been acted upon by a substantial majority of States; that majority must include this country if the rule is to be admitted as binding her Courts.

Three of the other judges took a laxer view. Coleridge, C.J., Brett, L.J., and Lindley, J., all names of the highest authority, were inclined to give much more force to International Law, as evidenced by the agreement of a substantial majority of nations, or even by the authority of text-writers, in its relation to the law of England. But it is not clear from their judgments whether they regarded the writings of jurists as evidence of practice, or as rules of International Law arrived at from an ideal basis. These judgments, therefore, are of no great assistance. The same applies to the case as a whole; for

[1] "Assent" as used in this and all similar contexts means that kind of assent by practice or course of action which we call customary as opposed to conventional International Law. It is true, of course, that assent is evidenced by a treaty. But conventional assent is practically never binding on our Courts without Act of Parliament.

the conviction was quashed by a narrow majority, and never twice upon the same ground. Through such a forest of divergent reasons it is neither easy, nor, indeed, profitable, to find a path. The judgment of Sir A. Cockburn is the only clear guide, and we shall see how his view has been adopted in more recent times.

The case of the *Parlement Belge* on appeal (1879 P.D. 197) is a good illustration of the manner in which the Courts treat the doctrine of assent. The Court decided for the privilege of the vessel not merely on considerations of International Law, but by reference to previous English and American decisions, notably *The Exchange, the Duke of Brunswick v. The King of Hanover, the Prins Frederick*, etc. The headnote gives the effect of the decision clearly and well. It runs:— "As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign State to respect the independence of every other, *each State declines to exercise* by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador, etc., etc. . . ."

Thus a rule of International Law was rendered effective in our Courts in a case where that rule had received the assent of this country.

57. The case of the *West Rand Central Gold Mining Company v. The King*[1] was a petition of right

West Rand, v. The King 1905.

[1] 1905, 2 K.B., 391.

which "alleged that, before the outbreak of war between the late S. African Republic and Great Britain, gold, the produce of a mine in the Republic owned by the suppliants had been taken from the suppliants by officials acting on behalf of the Government of the Republic; that the Government of the Republic by the laws of the Republic was liable to return the gold or its value to the suppliants; and that by reason of the conquest and annexation of the territories of the Republic by her late Majesty the obligation of the Government of the Republic towards the suppliants in respect of the gold was now binding upon his Majesty the King."

For the suppliants there appeared Lord Robert Cecil, K.C., J. A. Hamilton, K.C.,[1] and Theobald Matthew and A. M. Talbot with them. They argued that "the case for the suppliants may be put in the form of three propositions, the first of which is that by International Law, where one civilised State after conquest annexes another civilised State, the conquering State, in the absence of stipulations to the contrary, takes over and becomes bound by all the contractual obligations of the conquered State, except liabilities incurred for the purpose of or in the course of the particular war. The writings of jurists on International Law and stipulations in treaties are evidence of what is International Law. . ."

"Secondly International Law is part of the law of England." (The learned Counsel then cited the cases

[1] Now Lord Sumner, a Lord of Appeal in Ordinary.

discussed in other parts of this essay.) . . . "All these cases have been dealt with by the English Courts on the footing that the principles of International Law relating to them form part of the Common Law of England."

58. It is at this stage perhaps necessary to point out that it is doubtful whether any issue of International Law was under discussion at all, and not rather one which touched the Constitutional Law of this country, and no more.[1] The existence of the Boer Republic became terminated by subjugation. The life of the State became extinct. The arrangement made at the end of the war was rightly enough not termed a treaty, because the term treaty implies the contractual capacity, and *a fortiori*, the existence, of at least two sovereign States. In this instance there was only one. By the fact of subjugation the Boer territory and all persons upon it passed into the *imperium* of the conquering State. It would therefore seem that any rights which such persons might have been able to exercise were rights conferred upon them in virtue of their new citizenship and allegiance, if at all, that is to say, by the Constitutional Law of England, but certainly not by International Law. So that it seems hard to understand why such considerations were put forward and relied upon in the argument for the suppliants.

Question really one of Constitutional and not of International Law.

[1] This was certainly emphasised by Counsel for the Crown in arguing the demurrer. They relied on *Nabob of the Carnatic v. E. India Company* (1791, 1 Ves. Jun. 371) and other Indian cases. Cf. also *Cook v. Sprigg* (1899 A.C. 572).

Judgment of Lord Alverstone.

59. However, the references to the position of International Law in the English Courts in the judgment delivered by Lord Alverstone are of great value. He says (p. 402):—

"The views expressed by learned writers on International Law have done in the past and will do in the future valuable service in helping to create the opinion by which the range of the consensus of civilised nations is enlarged. But in many instances their pronouncements must be regarded rather as the embodiment of their views as to what ought to be, from an ethical standpoint, the conduct of nations *inter se* than the enunciation of a rule or practice so universally acted on or assented to as to be fairly termed, even in the qualified sense in which that word can be understood in reference to the relations between independent political communities, 'Law.' . . . The second proposition urged by Lord Robert Cecil that International Law forms part of the Law of England needs a word of explanation and comment. It is quite true that whatever has received the common consent of civilised nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called International Law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for these tribunals to decide questions to which doctrines of International Law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and

the International Law sought to be applied must like anything else be proved by satisfactory evidence which must show either that the particular proposition put forward has been recognised and acted upon by our own country or that it is of such a nature and has been so widely and generally accepted that it can hardly be supposed that any civilised State would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognised are not in themselves sufficient. They must have received the express sanction of international agreement or gradually have grown to be part of International Law by their frequent practical recognition in dealings between various nations. . . In our judgment the second proposition for which Lord R. Cecil contended in his argument before us ought to be treated as correct only if the term International Law is understood in the sense and subject to the limitations of application which we have explained. The authorities which he cited in support of the proposition are entirely in accord with and indeed well illustrate our judgment upon this branch of the argument advanced upon behalf of the suppliants. For instance, *Barbuit's Case*, *Triquet v. Bath* and *Heathfield v. Chilton* are cases in which the Courts of Law have recognised and have given effect to the privilege of ambassadors as established by International Law. But the expressions used by Lord Mansfield when dealing with the particular and recognised rule of International Law on this subject, that the Law of Nations forms part of the Law of England,

ought not to be construed so as to include as part of the Law of England opinions of text-writers upon a question as to which there is no evidence that Great Britain has ever assented, and *a fortiori* if they are contrary to the principles of her laws as declared by her Courts. The cases of *Wolff v. Oxholm* and *R. v. Keyn* are only illustrations of the same rule, namely, that questions of International Law may arise and may have to be considered in connexion with the administration of Municipal Law."

The modern Text-writer merely records Practice.

60. The learned Judge was clearly of opinion that the views of text-writers must be used with caution and are in no way evidence of the practice of States. It is doubtful whether this view is, in the light of modern conceptions of International Law, a sound one. The Positivistic has almost completely taken the place of the Naturalistic school. The text-books on International Law of the present day contain no speculations as to what the law ought to be; they merely record and register the law as it is; they mirror the practice of States. The conclusion, therefore, cannot be resisted that when our judges more correctly appreciate the radical change that has taken place in the conception of the basis and function of International Law, they will be inclined to accord to the writings of jurists a higher evidentiary value than they have hitherto done.

Lord Alverstone's view thus differs only slightly from that of Sir Alexander Cockburn in *R. v. Keyn*. We

saw that the latter required an Act of Parliament in order to make a proposition of International Law binding upon the Courts, in a case where the general consent of nations alone was relied on, a consent in which this country had shared neither by statutory nor judicial expression nor by practice.

Strict Proof of Assent required.

61. The effect of the judgment now under consideration is that in a proper case the Courts will elicit and apply a rule of International Law, such rule resting upon the practice of States including our own, or of such an obvious reasonableness in themselves that although there is no strict evidence of our assent such assent can be taken for granted. Thus it may be conjectured that the Courts would act benignantly in all cases of diplomatic privilege and might apply a practice which this country has not actually shared in forming, on the ground that the rules as to diplomatic immunities have been "so widely and generally accepted that it can hardly be supposed that any civilised State could repudiate them." Shortly put, then, the above propositions amount to this, that the Courts will give effect to clearly ascertained rules of International Law which rest upon the assent of a substantial majority of States, and that in arriving at any conclusion as to what is or is not a rule of International Law, reference to text-writers is of value only in so far as they afford evidence of practice. In order to establish the assent of this country in any given case, it is submitted that the strictest proof would

be required, and that nothing short of a certificate from the Foreign Office[1] would be sufficient. It must again be emphasised that the assent meant here is the assent in a course of practice, and not assent by treaty—in other words, custom as opposed to conventional International Law.

That kind of assent which is given by treaty requires in most cases an Act of Parliament before it can effectually bind the Courts.

Limitations within which International Law is part of Law of England

62. It seems, then, that the proposition, so frequently stated in the older cases and so loosely ventilated in the text-books, that "International Law is in its full extent part of the Common Law of England" must be received with limitations and with great modification. Although some of the judges in *R. v. Keyn*, notably Lord Justice Brett and Mr. Justice Lindley, were inclined to receive the International Law of the text-writer as part of the Law of England, we are bound to pay the greatest attention to the most weighty and luminous judgment of Sir A. Cockburn, and to the remarks of Lord Alverstone in the West Rand case, whose authority should be regarded as relevant and immediate, in view of its recent date and of the strength of the Court. Upon the whole we are justified in assuming that in the future the Courts

[1] Or an even stricter proof might demand the attendance on subpœna of a responsible official from the Foreign Office to speak to matters within his own knowledge. But certificate might be sufficient (*Mighell v. Sultan of Johore*, 1894, 1 Q.B.).

will be guided rather by the view more recently enunciated than by that of the earlier decisions; and that the proposition that International Law is in its full extent part of the Common Law of England is true only when subject to the limits and modifications laid down in the West Rand Case.

63. One last question remains. Even though it may be true to say, with the limitations above-mentioned, that International Law is part of the Law of England, is not such a statement susceptible of still further scrutiny? **Mode of Proving International Law.**

Let us see how Lord Alverstone's rule works in practice. We may assume that counsel argues to the Court (in a case where a rule of International Law is expressed neither in the Statutes nor in the Common Law of England) that a certain proposition is a rule of International Law. The International Law is then proved to the satisfaction of the Court by historical evidence as opposed to the speculations of jurists. The assent of this country is proved by certificate from the Foreign Office.[1] It is then embodied into the judgment of the Court.

Can we properly say that under these circumstances and with these limitations International Law is part of the law of the land? Now there can be no question that after a proposition of International Law has been so embodied in a judgment of the Court, a subsequent Court which is bound by the decision of its predecessor of simi-

[1] See above, p. 101.

lar degree will follow that judgment, because it is the judgment of an English Court competent to bind its successor by precedents of English Law, and not because or in so far as it enunciates rules of International Law.

But what is the true position of that rule of the Law of Nations before it is so adopted into and made part of English Law?

International Law a Question of Fact for the Court.

64. The first fact we have to note is that it has to be proved to the satisfaction of the Court. It is, in other words, a question of fact, like foreign law, for example; the Court takes no judicial cognisance of it. Professor Salmond[1] draws the distinction thus:—

"The whole body of legal rules is divisible into two parts which may be conveniently distinguished as General Law and Special Law. The former includes those legal rules of which the Courts will take judicial notice, and which will therefore be applied as a matter of course in any case in which the appropriate subject-matter is present. Special Law, on the other hand, consists of those rules which, although they are true rules of Law, the Courts will not recognise and apply as a matter of course, but which must be specially proved and brought to the notice of the Courts by the parties interested in their recognition. . . The test of the distinction is judicial notice. By this is meant the knowledge which any Court *ex officio* possesses and acts on,

[1] Jurisprudence (1907), p. 27.

as contrasted with the knowledge which a Court is bound to acquire through the appointed channel of evidence formally produced by the parties."

It would follow from this that nothing which requires proof in a Court can be in itself law to be applied unless and until such proof has been satisfactorily adduced. The examples of bodies of rules which the learned writer gives are Foreign Law, the Law Merchant (though since Lord Mansfield's day it is settled that this is part of the Common Law), Local Custom, etc. In all these cases the rules or the law in question have to be proved as a fact. But in all these instances the element of doubt and dispute as to the existence of the rules is exceedingly small, if it can be said that there is any. But the case is different with the propositions of International Law. A glance at even the most modern of text-books or at any judgment in which a proposition claiming to constitute a rule of the Law of Nations is examined is sufficient to show that here there is far less certainty and precision. If the examples of special rules given by Professor Salmond are not law and do not become binding upon the Court until ascertained and proved to its satisfaction, then *a fortiori* must this apply to the case of International Law, whose rules are often subject to the most acute discussion.

International Law a Source of English Law.

65. The true view would seem to be that so far from International Law being in any sense whatever a part of the Common Law of England it is merely a source of

law, and that this fundamental confusion between cause and effect has vitiated the whole controversy. It is a source of law classified by Professor Salmond under the head of "material source"; and his meaning is well shown in the following passage:—[1]

"In respect of its material origin a rule of law is often of long descent. The immediate source of it may be the decision of an English Court of Justice. But that Court may have drawn the matter of its decision from the writings of some lawyer, let us say, the celebrated Frenchman Pothier; and Pothier in his turn may have taken it from the compilation of the Emperor Justinian, who may have obtained it from the Prætorian edict. . . But there is a difference between them, for the precedent is the legal source of the rule and the others are merely its historical sources."

If we eliminate the idea that International Laws are derived by a similar legal causation we shall see that the comparison is apt. International Law is a material source of Common Law in the sense that rules derived thence find their way into it, just as the rules of local custom find their way into it and become after their adoption a living part of it.

We may then conclude that the proposition that In-

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[1] Jurisprudence, p. 118.

ternational Law is part of the Common Law is as inaccurate as is the proposition that it supersedes Acts of Parliament, and that all treaties form of themselves part of the law of the land to be recognised and acted upon by English Courts.

66. Before beginning the discussion of the position occupied by International Law in the United States of America, a word should be said showing how the American heritage of the English Common Law has influenced the question.

Connexion between English and American View

We have already seen that the doctrine that International Law is part of the Common Law may be traced back to the eighteenth century, and even earlier. At that time the view prevailed that International Law consisted of the principles of natural justice ; as the Common Law was similarly regarded, it was an easy conclusion that International Law was part of the Common Law. When the American colonies attained their independence this doctrine was still prevalent. Indeed, Mr. J. B. Scott, in the American Journal of International Law,[1] in labouring to show that International Law is part of the law of the United States, rests his argument upon the fact that the American colonies took over the English Common Law, which included the doctrine that

[1] 1907, Part II, p. 852.

International Law was part of itself. It has been previously shown[2] that as regards English Law this is no longer wholly true. In the following chapter it will be shown that the doctrine when applied to the United States is equally doubtful.

[2] See p. 102.

CHAPTER VI.

International Law and the Law of the United States.

No General Statement possible.

67. The place of International Law in the law of the United States is defined with a rather greater exactness than it is in English Law. Yet it is important not to be led into adopting the hasty conclusion that the question is answered beyond all doubt, or that there is any sharp and substantial distinction between the treatment of International Law in the law of the United States and in that of England. An examination of the judgments in which matters affecting international rights and duties have come under consideration warrants no such proposition. Rather will it appear that just as the doctrine so confidently stated in some quarters that International Law is "part of the law of England," is as a proposition neither wholly true nor wholly false, and can be received only with considerable modification, so we must equally beware of making any such sweeping statement in the case of the law of the United States.

Incorporation of International Law by the U.S. Constitution.

68. Before the cases are examined, it may be well to note the place accorded to International Law in the body of the written Constitution.

As early as 1781 we find that an Ordinance of Con-

gress[1] laid it down that the Commonwealth was born into the Family of Nations and was subject to all the rights and duties incident to that condition "according to the general usages of Europe"—in other words, that the International Law of the time was then binding upon it. It seems hardly correct to rely upon this as an enactment and incorporation of International Law into the law of the land; it is rather the statement of a fact of life as a civilised nation which has long been emphasised by lawyers.

In the Constitution, however, of 1789 we find a clearer expression under Art. I, s. 8. Power is vested in Congress to "Define and punish piracies and felonies committed on the high seas, and offences against the Law of Nations.

"To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." Under Art. II, s. 2, "The President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."

The relation in which International Law stands to the Common Law is thus left undetermined, and a general rule, if any exists, must be collected from the cases.

Treaties part of the Law of the Land.

69. We then get the rule that a treaty validly concluded by the President and subsequently ratified in a

[1] Journal of Congress, VII, 185.

certain manner requires no further enactment to make it binding upon citizens of the United States.

Dr. Westlake properly pointed out[1] that this difference in the treatment of international engagements in the two countries must not be taken to mean that a higher value is set upon the binding force of such obligations in American than it is in English law; but rather that the law of that country gives a wider power of making treaties to the Executive than does our own. How this power is limited and defined has been already discussed. In English Law it would seem that it is difficult to imagine a case in which a treaty could be enforced in an English Court so as to bind British subjects without the intervention of an Act of Parliament; except, it seems, in a Court of Prize.[2]

It is further provided by Art. VI of the Federal Constitution that "All treaties made or which shall be made under the authority of the United States shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

70. This is well illustrated in the early case of *Ware v. Hylton*.[3] In that case the treaty of 1783, which ended the War of Independence, was under discussion. **Ware v. Hylton, 1795**

[1] See above, p. 59.

[2] Cf. The *Chile*, T.L R., Oct. 23rd. 1914; the *Marie Glaeser ib.*

[3] 3 Dall. p. 236.

Mr. Justice Chase remarked in the course of his judgment:—

"If doubts could exist before the establishment of the present national government, they must be entirely removed by the Sixth Article of the Constitution. . . There can be no limitation of the power of the people of the United States. By their authority the State Constitutions were made, and by their authority the Constitution of the United States was established. . . A treaty cannot be the supreme law of the land, that is, of all the United States, if any Act of a State Legislature can stand in its way."

This yields the further proposition that a treaty, being embodied into the Law of the United States, overrides any act of any local legislature. Such a doctrine must logically follow from the legal apportionment of the powers of the several bodies under the American Constitution.[1]

A good illustration of this is also given by part of the head-note to *Worcester v. State of Georgia*, 1832, VI Peters, at p. 520. The relevant words are:—

"The Acts of the Legislature interfere forcibly with the relations established between the United States and the Cherokee nation, and the regulation of which, according to the settled principle of our Constitution, is committed exclusively to the government of the Union.

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[1] Cf. *Hauernstein v. Lynham*, 1879, 100 U.S. 483, where the same point arose, and the above judgment was quoted with approval.

"They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia, guaranteeing to them all the land within their boundary and solemnly pledge the faith of the United States to restrain their citizens from trespassing on it, and recognise the pre-existing power of the nation to govern itself."

Treaty placed on same level as Act of Congress.

71. Since the American Constitution places a duly concluded and ratified treaty on an equality with an Act of the Supreme Legislature, it must follow that that equality will be consistently pressed. Just as the prior Act of Congress yields to a later one, so is an earlier treaty overridden by a later Act of Congress that conflicts with it, and an Act of Congress by a subsequent and conflicting treaty. This proposition, self-evident in itself, and flowing from the very terms of the Constitution, has been further amplified and well illustrated in several cases.

Foster v. Neilson, 1829.

72. This question of conflict was dealt with in *Foster and Elam v. Neilson.*[1] Here the discussion turned upon the combined effect of the Treaty of Paris of 1803 between France and the United States and certain subsequent Acts of Congress defining the powers and rights conferred on the United States by that treaty. The following sentences from the judgment of Chief Justice

[1] 1829, 2 Pet. p. 254.

Marshall draw the same distinction between the legal and the diplomatic remedy that we saw drawn by Cockburn, C.J., in Keyn's case.[1] The Chief Justice says:—

"After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the Government claims it, to maintain the opposite construction in its own Courts would certainly be an anomaly in the history and practice of nations. If these departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign Powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the Legislature has acted on the construction then asserted, it is not in its own Courts that this construction is to be denied."

And later on he says:—

"Our Constitution[2] declares a treaty to be the law of the land. It is, consequently, to be regarded in Courts of Justice as equivalent to an Act of the Legislature whenever it operates by itself without the aid of any legislative provision. But when the terms of the stipulation impart a contract, when either of the parties engage to perform a particular Act, the treaty addresses itself to the political, not to the judicial department; and the Legislature must execute the contract before it can become a rule for the Court."

[1] See above, p. 50. [2] But it prevails if in conflict with treaty (*in re Dillon*, 5 Moore 78).

The Court followed the various Acts of Congress which had been passed subsequent to the Treaty and in modification or definition of its terms.

On a very similar point, cf. *U.S. v. Arredondo*, 1832, 6 Pet. and *U.S. v. Percheman*, 1832, 7 Pet. 51.

73. Similar language was used in the case of *Whitney v. Robertson*,[1] by Mr. Justice Field: "The Act of Congress," he said, "under which the duties were collected authorised their exaction. It is of general application, making no exception in favour of the goods of any country. It was passed after the treaty with the Dominican Republic, and, *if there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control.* A treaty is primarily a contract between two or more independent nations, and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured party through reclamation upon the other. . . . By the Constitution a treaty is placed on the same footing and made of like obligation with an Act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject the Courts will always endeavour to construe them so as to give effect to both, if that can be

Whitney v. Robertson, 1887.

[1] 1887, 124 U.S.

done without violating the language of either; but if the two are inconsistent the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing. If the country with which the treaty is made is dissatisfied with the action of the legislative department it may present its complaint to the executive head of the Government, and take such other measures as it may deem essential for the protection of its interests. The Courts can afford no redress. Whether the complaining nation has just cause of complaint or our country was justified in its legislation are not matters for judicial cognisance."

Distinction between legal and diplomatic Remedy

74. Here again we find the distinction between the legal and the diplomatic remedy, and a firm bridge of doctrine built between the observations of Cockburn, C.J., in Keyn's case,[1] on the one hand, and the judgments in *Mortensen v. Peters*[2] on the other. It must also be noted that the legislation which the learned judge speaks of as being necessary to give effect to an executory treaty must be kept distinct from the legislation which is necessary when by the Municipal Law of any given State a treaty concluded by it is not binding upon its subjects without an Act of the Legislature, as is necessary in certain matters according to the Law of England. But the legislation in such a case as this is necessary, because the Municipal Law of England

[1] See above, p. 50.
[2] See above, p. 51.

places restrictions upon the power of the Executive, whereas according to the American Constitution the Executive has the widest power of binding subjects by treaty. Thus Art. IX of the Jay treaty of 1794 between Great Britain and the United States enabled the subjects of one Power to hold land in the territory of the other. This came into operation forthwith in America in favour of British subjects, while in England the Act of 37 Geo. III was necessary to confer the same privilege upon American citizens.[1]

The Panama Canal Dispute.

75. The conflict between International Law (derived from treaty) and the Municipal Law of the United States assumed a practical shape in the controversy between Great Britain and the United States over the Panama Canal. It is not material here to specify the scope and nature of the dispute. It is sufficient to note that the Hay-Pauncefote treaty of September 18th, 1901, between Great Britain and the United States declared that the Panama Canal should be free and open to the vessels of all nations without discrimination in respect of traffic charges. Under s. 5 of the Panama Canal Act of Congress of August 24th, 1912, an exemption from tolls is contained in favour of vessels of the United States.[2] We have seen above that the United States Constitution places treaties on a level with Acts of Con-

[1] See Westlake in L.Q.R., 1906.

[2] For a full discussion of the whole question, see Oppenheim, "The Panama Canal Conflict," Camb. 1913.

gress; and thus treaties, being Acts of Congress, for all purposes, an earlier treaty is overridden by a later Act, if that Act be in conflict with it. "For this reason," says Professor Oppenheim,[1] "the American Courts cannot be resorted to in order to have the question decided whether or no the enactments of Section 5 of the Panama Canal Act are in conformity with Art. III, No. 1, of the Hay-Pauncefote treaty."[2]

Act of Congress overrides Customary International Law.

76. If an Act of Congress overrules a previous treaty inconsistent with it—if, in other words, it overrules Conventional International Law—it must *a fortiori* overrule Customary International Law.

In the case of *The Nereide*[3] Chief Justice Marshall said:—

"Even in the case of salvage, a case peculiarly within the discretion of Courts, because no fixed rule is prescribed by the law of nations, Congress has not left it to this department to say whether the rule of foreign nations shall be applied to them, but has by law applied that rule. If it be the will of the Government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the Government will manifest that will by framing an Act for the purpose. *Till such an Act be passed* the Court is bound by the Law of Nations which is a part of the law of the land."

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[1] At p. 42.
[2] Cf. also *The Kestor*, 1901, 110 Fed. 432.
[3] 1815, 9 Cranch, at p. 423.

Mr. J. B. Scott[1] also quotes a passage from Bishop's Criminal Law in which the same rule is laid down:— "Doubtless, if the Legislature, by words admitting of no interpretation, commands a Court to violate the Law of Nations, the judges have no alternative but to obey. Yet no statutes have ever been framed in form thus conclusive; and if a case is *prima facie* within the legislative words, still a Court will not take the jurisdiction should the Law of Nations forbid."

That is in complete agreement with the most recent English doctrine, as illustrated by *Mortensen v. Peters* in the Scottish Courts.[2]

Presumption in construing Act of Congress.

77. The English rule of construction, that an Act of Parliament will be read with the presumption that English Law is not in conflict with the Law of Nations, finds a parallel in the Law of the United States. In the case of *Murray v. The Charming Betsey*,[3] the Act of February, 1800, prohibiting commercial intercourse between the United States and France, was under consideration. The rule of construction was plainly laid down by Chief Justice Marshall: "It has also been observed," he said, "that an Act of Congress ought never to be construed to violate the Law of Nations if any other possible construction remains, and, consequently, can never be construed to violate neutral rights or to

[1] In Amer. Journal of Int. Law, 1908, at p. 858.
[2] 1906, 8 Fraser.
[3] 1804, 2 Cranch, at p. 118.

affect neutral commerce further than is warranted by the Law of Nations as understood in this country."

Power of Congress to punish offences against law of nations.

78. It has been already noted that the Constitution gives Congress a power to "define and punish piracies and felonies committed on the high seas, and offences against the Law of Nations." In the case of the *United States v. Smith*[1] the prisoner was tried for piracy under an Act of Congress of March 3rd, 1819, referring to the Law of Nations for a definition of that offence.

Customary International law, "Paquete Habana," 1899.

79. The position in the Law of the United States of customary rules of International Law is discussed in the *Paquete Habana* and the *Lola*.[2] These were two fishing-smacks captured in the Spanish-American War by American warships. The questions for the Court were (1) whether there is any exemption from capture for such vessels in International Law, and (2) whether that law is part of the Municipal Law of the United States in the absence of treaty or Act of Congress. Mr. Justice Gray said:—

"International Law is part of our law, and must be ascertained and administered by the Courts of Justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and

[1] 1820, 5 Wheaton, p. 153.
[2] 1899, 175 U.S. 677.

no controlling executive or legislative Act or judicial decision, resort must be had to the customs and usages of civilised nations; *and as evidence of these, to the works of jurists and commentators*, who, by years of labour, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."

The American Court was thus prepared to go further than was Lord Alverstone, C.J., in the West Rand case.[1] It will be remembered that he declined to apply any rule of International Law in an English Court which had not received the assent of Great Britain, or the assent of a preponderating majority of civilised States. He rejected the work of jurists as of no value for the determination of the question of assent. It was pointed out when that judgment was analysed[2] that the learned judge had failed to realise the radical change that has taken place in the fundamental conception of International Law and of the province of the text-writer, the change from the region of speculation to that of practice. The modern writer on International Law merely records the practice of States; and, if that practice is sufficiently certain and continuous, he deduces a rule therefrom. Hence his work may well be evidence of that practice. It is the

[1] See above, p. 98.
[2] See p. 100.

recognition of this new basis that makes the American judgment just cited of more value than that of Lord Alverstone.

Prof. Oppenheim's View.

80. Professor Oppenheim, in his monograph on the Panama Canal,[1] summarises the American view of the position of International Law in relation to the Municipal Law of the United States as follows: "Now the practice of the Courts of the United States neither agrees with the doctrine of the former nor with the doctrine of the latter school of publicists, but takes a middle line between them.[2] Indeed, it considers International Law to be part and parcel of the Municipal Law of the United States. It is, however, far from accepting the maxim that International Law overrules Municipal Law: it accepts rather two maxims, namely, first, that *International Law overrules previous Municipal Law*, and secondly that *Municipal Law overrules previous International Law*.

Mr. Willoughby's View.

81. Mr. W. W. Willoughby, too, in an article in the "American Journal of International Law,"[3] dissents from the general proposition that International Law is part of the Law of the United States. "It is true," he says, "that these Courts [i.e., English and American] adopt

[1] "The Panama Canal Conflict," Cambridge, 1913, pp. 40, 41.

[2] The allusion is to the two opposing theories that International Law overrules Municipal Law, and that Municipal Law overrules International.

[3] 1908, p. 357.

and apply established principles of International Law; but in so applying and enforcing them they consider them as having been first impliedly adopted by the English or American State, as the case may be, as a portion of its Municipal Law."

This seems a just and accurate statement of the true relation between International and Municipal Law; though Mr. Willoughby seems to carry his doctrine to an extreme length of artificiality in his view of the action of the American Courts in holding, in the *Paquete Habana*, that by a customary rule of International Law small fishing vessels are exempt from capture. Commenting on the power vested by the Constitution in Congress of defining and punishing offences against the law of nations, he says: "The effect of these clauses which recognise the existence of a body of international laws and the granting to Congress of the power to punish offences against them the Courts have repeatedly held is to adopt these laws into our municipal law *en bloc*, except where Congress or the treaty-making Power has expressly changed them."

From this, it would follow that the American Courts, in pronouncing for the exemption of the fishing-vessels, went upon an Act of Congress and not upon a rule of International Law.

Lastly, one very important distinction should be borne in mind. We have already seen that the proposition that International Law is part of the law of England is, in all its width and generality, as untrue as the proposi-

tion that International Law is part of the law of the United States. But even if this were true without any limit or modification whatsoever, it would only be true in virtue of the express or implied rules of the law of those States. The doctrine that International Law is part of the Law of England rests, in so far as there is any truth in it, upon the law of this country as expressed in the body of judicial precedents which we call the Common Law; and so far as the same is true of the United States, upon the written constitution of that country and its judicial interpretation. Therefore, the position of International Law in neither of these States is such as to support the wider contention advanced by some writers that International Law is a law superior to Municipal Law, and, therefore, *of itself* incorporated into the Municipal Law of each State in such a way as to overrule any provisions of that law which may be out of harmony with it.[1] International Law, in so far as it can ever be said to be part of the law either of this country or of the United States, occupies such position by virtue of its adoption in part by their Municipal Law.

[1] See Oppenheim, "The Panama Canal Conflict," Cambridge, 1913, p. 39.

General Conclusions

(*A*) *International Law and the Law of England.*

1. An Act of Parliament is binding certainly on ordinary Courts, and almost certainly on Courts of Prize, although it be in conflict with International Law.
2. A treaty which affects the private rights of British subjects is not binding upon ordinary Courts without an Act of Parliament; nor is any stipulation of a treaty which conflicts with existing statute law; but in a Court of Prize a treaty is deemed to add to the stock of International Law of which such a Court will take notice.
3. It is not certain whether an Order in Council, which is in conflict with International Law, will in a Prize Court be enforced at the expense of that Law: if the conflict is too great for reconciliation it seems that International Law will prevail.
4. In the absence of any treaty or statute, a rule of customary International Law will be regarded as part of the law of the land, and so enforced in

our courts, only if such rule has received the assent of this country in practice, unless the proposition in question is of such antiquity and generality that the assent of this country may be presumed.

5. Enacted law, whether it be an Act of Parliament or an Order in Council, will be construed with the presumption that the enacting authority has intended no discrepancy between Municipal and International Law.

(*B*) *International Law and the Law of the United States.*

1. A treaty made by the President and ratified with the consent of the Senate is part of the law of the land and on the same level as an Act of Congress; so that an earlier Act of Congress may be overruled by a later treaty and an earlier treaty by a later Act of Congress.
2. An Act of Congress overrules customary International Law.
3. Customary International Law, unless and until overruled by Act of Congress, is recognised and applied in the Courts; and for this purpose the works of the text-writers are regarded as affording evidence of what is International Law.
4. An Act of Congress is construed with the presumption that no violation of International Law has been intended.

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